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3490

v. 3490

FEB 26 1969

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See Vol.  
3756  
/ /

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

TECHNICAL PUBLICATIONS INSTITUTE  
and the owners and operators thereof,  
and FRANK CSASZAR, its manager,

Appellants,

v.

STANLEY MOSK, Attorney General of the  
State of California,

Appellee.

CIVIL ACTION  
FILE NUMBER

17385 ✓

APPLICATION FOR EXTENSION OF TIME  
IN WHICH TO FILE BRIEF OF APPELLEE

AFFIDAVIT OF NORMAN L. EPSTEIN



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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

TECHNICAL PUBLICATIONS INSTITUTE }  
and the owners and operators thereof, }  
and FRANK CSASZAR, its manager, } No. 17385  
  
Appellants, } APPLICATION FOR EXTEN-  
v. } SION OF TIME IN WHICH  
STANLEY MOSK, Attorney General of the } TO FILE BRIEF OF  
State of California, } APPELLEE  
Appellee. }

NOW COMES THE APPELLEE and prays this Honorable Court that in the event of a denial of the Motion to Dismiss Appeal, dated July 12, 1962 and filed by appellee concurrently herewith, that its time to file a brief of appellee be extended to a date thirty days following notification of such ruling.

Dated this 12th day of July, 1962.

STANLEY MOSK, Attorney General  
NORMAN L. EPSTEIN,  
Deputy Attorney General  
NORMAN L. EPSTEIN  
By \_\_\_\_\_  
NORMAN L. EPSTEIN  
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UNITED STATES COURT OF APPEALS  
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Appellants,  
  
v.  
  
STANLEY MOSK, Attorney General of the  
State of California,  
  
Appellee.

No. 17385

AFFIDAVIT OF

NORMAN L. EPSTEIN

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } SS.

NORMAN L. EPSTEIN, being first duly sworn, deposes and says:

That at all times herein mentioned, affiant was a Deputy Attorney General in the office of the Attorney General of the State of California;

That concurrently with the filing of this motion,  
appellee has filed with this Honorable Court a Motion to  
Dismiss Appeal, together with notice to appellants thereof,  
and Memorandum of Points and Authorities and Certified Court  
Records in support thereof; that said motion is noticed for



hearing before this Honorable Court in Los Angeles on Monday, September 10, 1962; that affiant believes said motion to be meritorious; that should said motion be granted and the instant appeal be dismissed, neither an appellee's brief nor an appellant's reply brief would be necessary; that it would be expeditious to this Court, to the parties and to all counsel to extend the time for filing of further briefs until said motion has been determined.

NORMAN L. EPSTEIN

---

NORMAN L. EPSTEIN

Subscribed and sworn to before me

this 12th day of July, 1962

IRIS M. NACHTWEIN

---

Notary Public in and for said  
County and State



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FEB 21 1969

UNITED STATES COURT OF APPEALS  
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TECHNICAL PUBLICATIONS INSTITUTE  
and the owners and operators thereof,  
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Appellants,

v.

STANLEY MOSK, Attorney General of the  
State of California,

Appellee.

CIVIL ACTION  
FILE NUMBER

17385

MOTION TO DISMISS APPEAL

NOTICE OF MOTION

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION

CERTIFIED COURT RECORDS

Exhibit A:

Complaint for Preliminary Injunction and  
For Permanent Injunction (Education Code  
§ 29017)

Exhibit B:

Stipulation to Entry of Judgment Permanently  
Enjoining Defendants Technical Publications  
Investment Corporation, Technical Publica-  
tions Institute, Inc., Barnarr R. Cannon and  
Frank Csaszar and for Dismissal as to Defendant



## TOPICAL INDEX

	Page
MOTION TO DISMISS APPEAL	1-2
NOTICE OF MOTION	3
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION	4-21
PRELIMINARY STATEMENT	4-5
STATEMENT OF THE CASE	5-10
ARGUMENT	10-21
I AN APPEAL DOES NOT LIE FROM THE ORDER OF THE DISTRICT COURT ENTERED DECEMBER 15, 1960	10-15
II THE DENIAL OF A TEMPORARY RE- STRAINING ORDER HAS BECOME MOOT	16-19
A. <u>By the Subsequent Judgment              of Dismissal</u>	16
B. <u>By the Stipulation for              Judgment and Final Judgment              Pursuant Thereto of the              Superior Court of the State              of California</u>	16-19
III APPELLANTS' DISREGARD OF THE RULES GOVERNING APPEALS WARRANT DISMISSAL OF THEIR APPEAL	20-21
CONCLUSION	21



## LIST OF AUTHORITIES CITED

CASES	Page
Beecher v. Leavenworth State Bank, 214 F.2d 113	21
Benz v. Compania Naviera Hidalgo, S. A., 205 F.2d 944	19
Connell v. Dulien Steel Products, 240 F.2d 414	12,13-14
Davis v. Hayden, 238 Fed. 734	14
Hargraves v. Bowden, 217 F.2d 839	20
Houghton v. Meyer, 208 U.S. 149	13
Leader Clothing Co. v. Fidelity and Casualty Company of New York, 227 F.2d 574	16
McCaw v. Fase, 216 F.2d 698	19
Milbert v. Bison Laboratories, 260 F.2d 431	15
National Bible Knowledge Association v. Dumont Broadcasting Corporation, 239 F.2d 74	19
Oakland Dock & Warehouse Co. v. United States, 193 F.2d 493	16
Pack v. Carter, 223 Fed. 638	13
Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 276 F.2d 931	12
Petty v. Tennessee-Missouri Bridge Commission, 254 F.2d 857	6
St. Helen v. Wyman, 222 F.2d 890	13,15



	Page
Sobel v. Whittier Corp., 195 F.2d 361	16
Spears v. Shell Oil Co., 249 F.2d 396	21
Starr v. Schram, 143 F.2d 561	6
Tucker Products Corporation v. Helms, 171 F.2d 126	21

#### STATUTES

##### California Education Code:

§29001	5,6,9,10,17
§§29001-29022	17
§29020	5,6
§§11183-11188	6

##### 28 U.S.C.:

§1291	4,11
§1292	11,12,15
§1292(a)	4,11
§1292(b)	4,11-12
§1915	20
§2201	7
§2281	7
§2283	7
§2284	7

#### CONSTITUTIONS

##### United States Constitution:

Article I, §10	8
First, Fourth, Fifth, Fourteenth Amendments	8



## RULES OF THE COURT

## Federal Rules of Civil Procedure:

73(a) 21

73(c) 5,8,20

75(j) 2

## United States Court of Appeals

for the Ninth Circuit, 17.6 5,20



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UNITED STATES COURT OF APPEALS  
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Appellants,

v.

STANLEY MOSK, Attorney General of the  
State of California,

Appellee.

No. 17385

MOTION TO DISMISS  
APPEAL

Appellee moves the Court to dismiss the appeal  
from the order of the United States District Court of the  
Southern District of California, Central Division, entered  
December 15, 1960, taken by appellants by notice of appeal  
filed January 9, 1961, upon the grounds that:

1. the order appealed from is nonappealable;
2. this case has become moot subsequent to the  
filing of notice of appeal;
3. appellants have failed to comply with the  
Federal Rules of Civil Procedure governing  
appeals.

This motion is based upon the Transcript of Record



and Transcript of Record re Preliminary Hearing pursuant to Rule 75(j), F.R.C.P., on file herein, together with the Notice of Motion, Memorandum of Points and Authorities in Support of Motion and Exhibits A, B and C, attached hereto.

Dated: This 12th day of July, 1962.

STANLEY MOSK, Attorney General  
NORMAN L. EPSTEIN,

Deputy Attorney General

NORMAN L. EPSTEIN

By \_\_\_\_\_

NORMAN L. EPSTEIN  
Deputy Attorney General

Attorneys for Appellee



NOTICE OF MOTION

NOTICE IS HEREBY GIVEN that the foregoing motion will be brought on for hearing before the United States Court of Appeals for the Ninth Circuit in its courtroom, Sixteenth Floor, United States Post Office and Courthouse Building, Los Angeles 12, California, on Monday, September 10, 1962, at 9:30 a.m., or as soon thereafter as counsel may be heard.

STANLEY MOSK, Attorney General  
NORMAN L. EPSTEIN,  
Deputy Attorney General

NORMAN L. EPSTEIN

By \_\_\_\_\_  
NORMAN L. EPSTEIN  
Deputy Attorney General

Attorneys for Appellee



MEMORANDUM OF POINTS AND AUTHORITIES IN

SUPPORT OF MOTION

PRELIMINARY STATEMENT

Appellants appealed from the order of the United States District Court dated December 12, 1960, and entered December 15, 1960 denying their request for a temporary restraining order. (Transcript of Record, hereinafter referred to as "Tr. Rec.", pp. 22-25, 27.) While the Court declined, ex parte, to convene a three-judge statutory court due to the lack of a substantial federal question, it did not dismiss the Petition, but permitted appellants' request for a three-judge court, for preliminary and permanent injunctions and for declaratory relief to be determined upon adversary pleadings following service of the Petition. (Tr. Rec. pp. 22-24.)

The order appealed from is neither the final decision of a district court (28 U.S.C., Section 1291), nor an interlocutory order specified in 28 U.S.C., Section 1292(a), nor an interlocutory order with respect to which a district judge has certified the presence of a "controlling question of law as to which there is substantial ground for difference of opinion", as provided in 28 U.S.C., Section 1292(b). It follows that the order is not appealable, and that the appeal therefrom should be dismissed.

Dismissal of the appeal is also required by the mootness of the case. Subsequent to entry of the order



not only has the entire proceeding been reduced to final judgment in the District Court, by the terms of which the action was dismissed, but, in addition, all of the appellants, save one, have stipulated to an injunction by the California Superior Court restraining them from carrying on the very activities whose investigation they sought to enjoin below. The single appellant not so enjoined has declared under oath in the California Superior Court proceedings that she no longer has any interest in such activities.

Finally, by their failure to file a Statement of Points for five months following the time it was due (Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17.6), and by their failure to post a bond on appeal at any time (Federal Rules of Civil Procedure, Rule 73(c)), appellants have flagrantly disregarded mandatory rules established for proceedings on appeal.

For each of these reasons -- non-appealability of the order below, mootness of the case, and disregard of the rules on appeal -- it is respectfully submitted that the appeal should be dismissed.

#### STATEMENT OF THE CASE

Appellants' action was commenced on December 12, 1960 by the filing of their Petition for a statutory three-judge court, a temporary restraining order, declaratory relief and preliminary and permanent injunctions restraining the Attorney General of the State of California, and the State of California, from enforcing Sections 29001-



29020 of the California Education Code, and Sections  
11183-11188 of the California Government Code.<sup>1</sup>

(Tr. Rec. pp. 3-21.)

1

While the Petition below (Tr. Rec. p.3), the Notice of Appeal (Tr.Rec., p.27), and the Appellants' Statement of Points (Tr.Rec., p. 32) named both the Attorney General of California and the State of California as defendants or appellees, subsequent filings of appellants ("Motion and Affidavit in Support of Motion" dated March 9, 1962; "Opening Brief on Appeal") name only the Attorney General. The same is true of the Transcript of Record.

Accordingly, it would appear that appellants have abandoned their appeal with respect to the State of California.

At any event, it is noted that separate motions to dismiss were filed on behalf of each named defendant (Transcript of Record re Preliminary Hearing Pursuant to Rule 75(j), F.R.C.P., hereinafter referred to as "Tr.Rec.Prel.", pp. 2,25, respectively), and that separate judgments of dismissal were filed with respect to each. (Tr.Rec.Prel., pp. 52,54, respectively.)

Of course, a suit in federal court by private litigants against a state as such is prohibited by the Eleventh Amendment.

Starr v. Schram, 143 F.2d 561, 563 (6th Circ.1944);

Petty v. Tennessee-Missouri Bridge Commission,

254 F.2d 857, 862 (8th Circ., 1958).

Accordingly, it is respectfully requested that if this Court does not consider the appeal to have been abandoned with respect to the State of California, that this motion and supporting materials be considered on behalf of the State of California, as well as the Attorney General.



Federal jurisdiction was asserted under 28 U.S.C.

Sections 2281, 2283 and 2284, relating to three-judge statutory courts, and 28 U.S.C., Section 2201, relating to declaratory relief. (Tr. Rec., p. 3.)

The Petition alleged, inter alia, that appellants publish and circulate courses in technical subject materials, charge fees for instruction offered, and give to students completing their courses certificates stating that they have satisfactorily completed the courses taken. (Tr. Rec. pp. 6-8.) It is asserted that "Because of the attempted investigation of the Attorney General, the proceedings herein sought to be enjoined, [the value of the school had dropped to] less than \$1,000,000 and unless an injunction is issued, the Institute may be entirely and totally destroyed." (Tr. Rec., p. 8.) This is apparently because there are rival institutions in the area, and the availability of student lists to them would ". . . cause great and irreparable damage and injury . . ." (Tr. Rec., p. 8) and because of alleged unfavorable publicity due to newspaper reporting of the investigation. (Tr. Rec., p. 20.)

The Petition recites the administrative subpoena duces tecum ad testandum issued by the Attorney General on May 11, 1960 (Tr. Rec., pp. 9-12), and the facts that appellants did not obey it, following which the Superior Court of the State of California issued its order on appellee's Petition ordering that they produce the records specified (September 20, 1960) and subsequently found them in contempt for disregarding the Court's order and fined them accordingly (November 18, 1960, stayed until December 10, 1960).



(Tr. Rec., pp. 12-14.) The California District Court of Appeal denied appellants' petition for prerogative writs, and the Supreme Court denied a petition for hearing.

(Tr. Rec., p. 13.)

Multiple and overlapping grounds of asserted unconstitutionality are claimed, including violations of Article I, Section 10, and the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

(Tr. Rec., pp. 14-20.)

On December 12, 1960, Judge Leon R. Yankwich denied appellants' ex parte request for a temporary restraining order and for convening of a three-judge statutory court, but permitted appellants to serve their complaint so that the matter might be resolved upon adversary proceedings. (Tr. Rec., pp. 22-25.)

It is from this order that appellants appeal.

(Tr. Rec., pp. 27, 28.)

The Petition was subsequently served, following which appellee filed his motion to dismiss. (January 9, 1961.) (Tr. Rec. Prel. p. 2.) The District Court's Judgment of Dismissal was duly entered on March 15, 1961.

(Tr. Rec. Prel., p. 52.)

Appellants' Statement of Points in the instant appeal was not filed until August 9, 1961. (Tr. Rec., pp. 32-33.) No bond on appeal pursuant to Rule 73(c) of the Federal Rules of Civil Procedure has ever been filed.

The certified records attached to this Motion (Exhibits A, B, C) establish that on February 16, 1961,



appellee, on behalf of the People of the State of California, filed a Complaint to permanently enjoin appellants<sup>2</sup> from issuing or conferring, or threatening to issue or confer, "diplomas" as that term is defined in Education Code Section 29001, without prior compliance with the California Education Code. (Exhibit A.)

Thereafter, on April 9, 1962, appellants stipulated with appellee that the Superior Court issue an injunction permanently enjoining, restraining and prohibiting each of the appellants, with the exception of Marie T. Cannon, as well as all persons acting under, by, through or on their behalf, from issuing or conferring, or threatening, promising or offering to issue or confer any writing evidencing the completion of any course of study in certain

2

The Petition below was brought by "Technical Publications Institute and the Owners and Operators thereof, and Frank Csaszar, its manager." (Tr. Rec., p. 3.) The Complaint for injunctive relief filed in the California Superior Court was brought against "Technical Publications Investment Corporation, a corporation; Technical Publications Institute, Incorporated, a corporation; Barnarr R. Cannon; Marie T. Cannon; Patrick S. Mitton; Frank Csaszar, Does I to X," (Exhibit A). The corporate defendants were each alleged to be operating a school of technical writing known as Technical Publications Institute at the same address. The Cannons and Mitton were directors of one and the Cannons and Csaszar the directors and officers of the other. (Exhibit A, paragraphs V, VI.)



designated fields, or any other course which is "beyond high school" as that term is defined in Section 29001 of the Education Code, without having previously satisfied certain conditions set forth in the Stipulation. The Stipulation recited that the instant appeal is now pending before this Court, but did not purport to preserve any rights or standing which appellants might have had to prosecute it. Among its other provisions, the Stipulation provided for the dismissal of Marie T. Cannon, in view of her Declaration attached to the Stipulation. Mrs. Cannon's Declaration stated, under penalty of perjury, that she no longer had any connection with the other appellants and was powerless to answer for any of them or for the correspondence school business conducted by them, and that on or about May 5, 1961 she had relinquished all rights and claims to the correspondence school business of Barnarr R. Cannon (one of the owners of Technical Publications Institute). (Exhibit B.)

On April 12, 1962, the Court duly entered its formal Judgment by Court Pursuant to Stipulation, enjoining appellants as provided by the Stipulation. (Exhibit C.)

#### ARGUMENT

##### I

AN APPEAL DOES NOT LIE FROM THE ORDER  
OF THE DISTRICT COURT ENTERED  
DECEMBER 15, 1960

As we have noticed, the Court's Order of December 12, 1960, entered December 15, 1960, was restricted to a denial of appellants' request for ex parte relief. A determination with respect to convening of a statutory



three-judge court was postponed until the issue could be raised upon adversary pleadings, and the request for a temporary restraining order was denied. (Tr. Rec., pp. 22-25.)

In pertinent part, 28 U.S.C., Sections 1291 and 1292, provide:

Section 1291. "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."

Section 1292(a). "The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers,  
. . .

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order



involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Determination of whether an order is appealable is, of course, fundamental (Connell v. Dulien Steel Products, 240 F.2d 414, 417 [5th Cir., 1957]), and goes to the jurisdiction of the appellate court. (Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 276 F.2d 931, 932 [3rd Cir., 1960]).

Obviously, the instant order of the District Court is neither a final decision, nor an interlocutory order involving receivership, admiralty or patent infringement. Jurisdiction to entertain the appeal must, therefore, be found, if at all, in subdivisions (a) (1) or (b) of 28 U.S.C., Section 1292.

As to the first of these (orders ". . . granting, . . . [or] refusing . . . injunctions . . ." [28 U.S.C., Section 1292(a) (1)]), it is clear that an order refusing



or allowing a temporary restraining order does not constitute an order "granting, . . . [or] refusing . . . [an] injunction. . . ."

St. Helen v. Wyman, 222 F.2d 890, 891 (9th Cir., 1955);

Connell v. Dulien Steel Products, supra (240 F.2d 414, 417-418 [5th Cir., 1957]);

Pack v. Carter, 223 Fed. 638, 640-641 (9th Cir., 1915).

The distinction between such an order and an interlocutory injunction, the refusing of which is appealable, is well stated in Houghton v. Meyer, 208 U.S. 149, 156, 28 S. Ct. 234, 236, 52 L.Ed. 432 (1908), quoted in Pack v. Carter, supra (223 Fed. 638, 640-641 [1915]):

"'" A temporary restraining order is distinguished from an interlocutory injunction, in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction, and its life ceases with the disposition of that motion and without further order of the court, while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause, and stands as a binding restraint until rescinded by the further action of the court."'"

In Connell v. Dulien Steel Products, supra (240 F.2d 414, 418 [5th Circ., 1957]), the Fifth Circuit stated the reasons for disallowance of appeals from orders granting or denying temporary restraining orders



as follows:

". . . The practical reasons for not generally allowing appeals from temporary restraining orders are that (1) they are usually effective for only very brief periods of time, far less than the time required for an appeal (which accounts for the paucity of cases on this point), and are then generally supplanted by appealable temporary or permanent injunctions, (2) they are generally issued without notice to the adverse party and thus the trial judge has had opportunity to hear only one side of the case, and (3) the trial court should have ample opportunity to have a full presentation of the facts and law before entering an order that is appealable to the appellate courts. Where, as here, the duration of the order barely extends beyond 20 days and even though issued after notice (perhaps insufficient) we think it is not a temporary injunction and appealable. Appellant should have waited for another two weeks from the date on which he filed this appeal, at which time the trial court could have disposed of the question whether enforcement of the state judgment should be enjoined pending a full trial on the merits."

Cf. Davis v. Hayden, 238 Fed. 734, 736-737 (4th Circ., 1916), cert. den. 243 U.S. 636, 37 S. Ct. 400, 61 L. Ed. 941 (1917).

While the addition of subdivision (b) to 28 U.S.C.,



Section 1292 by an amendment in 1958 (Public Law 85-919) permits discretionary appeals from interlocutory orders not otherwise specified in Section 1292, appellants have not even attempted to satisfy the requisites specified in that subdivision for such review. Before an appeal will lie pursuant to Section 1292(b), it is necessary, first, "that the district judge making the order sought to be appealed from shall have stated in writing 'in such order' that in his opinion 'such order' involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", and, second, that the appellant apply to the Court of Appeals for permission to appeal under this subdivision within ten days of the entry of the order.

Milbert v. Bison Laboratories, 260 F.2d 431, 435 (3rd Circ., 1958).

In this case, the District Judge has made no such statement as is required by the subdivision, nor does it appear that he has ever been requested to do so. (See Tr. Rec. Prel., pp. 52-53.)

In the absence of any ground upon which appealability of the order below can be sustained, it is submitted that the appeal taken must be dismissed. (St. Helen v. Wyman, supra (222 F.2d 890, 891 [9th Circ., 1955]).)

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THE DENIAL OF A TEMPORARY RESTRAINING ORDER HAS BECOME MOOT

A. By the Subsequent Judgment of Dismissal.

On the same day appellants filed their Notice of Appeal from the instant order of the District Court (Tr. Rec., p. 27), appellee moved the Court to dismiss the entire Petition. (Tr. Rec. Prel., p. 2.) On February 28, 1961, this motion was granted (Tr. Rec. Prel., p. 50), and a Judgment of Dismissal was duly entered on March 15, 1961. (Tr. Rec. Prel., p. 52.)

It is obvious that following entry of judgment dismissing appellants' entire Petition, any questions going to the previous denial of their ex parte request for a temporary restraining order became moot.

See Oakland Dock & Warehouse Co. v. United States,  
193 F.2d 493, 494 (9th Cir., 1951);

Sobel v. Whittier Corp., 195 F.2d 361, 363  
(6th Circ., 1952);

Leader Clothing Co. v. Fidelity and Casualty Company of New York, 227 F.2d 574, 576  
(10th Circ., 1955).

B. By the Stipulation for Judgment and Final Judgment Pursuant Thereto of the Superior Court of the State of California.

On February 16, 1961, a date subsequent to the instant order and Notice of Appeal and prior to the Judgment of Dismissal, appellee filed a Complaint in the Superior



Court of the State of California seeking to permanently enjoin the instant appellants, together with their officers, agents, servants and employees, from issuing or conferring or threatening to issue or confer any diploma without prior compliance with the California Education Code. (Exhibit A, p. 10.)

The provisions of the Education Code referred to in the Complaint were Sections 29001-29022, the same sections attacked as unconstitutional in appellants' Petition, and the very sections with respect to which appellants sought to enjoin investigation of compliance. (Exhibit A; Tr. Rec., pp. 3-21.)

It is therefore of considerable significance that on April 5, 1962 appellants and appellee (respectively defendants and plaintiff in the State court proceeding) formally stipulated that:

"[The Superior Court] may issue a judgment permanently enjoining, restraining and prohibiting Technical Publications Investment Corporation, a corporation, Technical Publications Institute, Incorporated, a corporation, Barnarr R. Cannon and Frank Csaszar, and each of them, their successors, officers, directors, agents, servants, employees and all persons acting under, by, through or on behalf of said named defendants, from issuing or conferring, or threatening, promising, or offering to issue or confer any writing evidencing completion of any course of study in the fields of technical



writing, engineering, drafting, electronics, or any combination thereof, or any other course of study which is 'beyond high school' as that term is used in Section 29001 of the California Education Code, without having previously filed the affidavit and appraisal and otherwise having previously satisfied the requirements of Section 29007 subdivision (a) of said Code, or without having previously been licensed, approved, accredited, permitted or authorized so to do, as the case may be, as provided by Sections 29007 or 29007.2 of said Code." (Exhibit B, Paragraph 1.)

This Stipulation recited the pendency of the instant appeal, but did not purport to preserve any standing appellants might have had to prosecute it. (Exhibit B, Paragraph 3.)

"In view of the Declaration of Marie T. Cannon", attached to the Stipulation, the Complaint against her was dismissed with prejudice. (Exhibit B, Paragraph 6.) In the Declaration of Marie T. Cannon referred to, Mrs. Cannon declared under penalty of perjury that while she had been an officer and director of the defendant corporation solely for convenience of Mr. Cannon, in actuality she was "little more than a clerk", that she held no stock, and acted only as directed by Mr. Cannon, and that following her divorce from the latter, she resigned her offices and relinquished all rights and claims to his correspondence school business. She declared that she has no connection with the corporate



defendants, and is powerless to answer for them or for the correspondence school business conducted by them. (Exhibit B, first attachment.)

On April 12, 1962 the Superior Court duly entered its Final Judgment by Court Pursuant to Stipulation, enjoining appellants in the manner provided by the Stipulation. (Exhibit C.)

By their Stipulation for Entry of Judgment and the judgment subsequently entered, each of the appellants save one (Marie T. Cannon) has consented to enforcement against them of the same provisions of the California Education Code attacked below as unconstitutional. The one exception, by her own Declaration, no longer has any interest in appellants' business.

It is submitted that under these circumstances, no substantial justiciable controversy remains between the parties, and that the appeal should for this additional reason, be dismissed as moot.

See: Benz v. Compania Naviera Hidalgo, S.A.,  
205 F.2d 944, 946-947 (9th Cir., 1953), cert.  
den. 346 U.S. 885, 74 S.Ct. 135 (1953);

National Bible Knowledge Association v. Dumont Broad-  
casting Corporation, 239 F.2d 74, 75 (D.C. Cir.,  
1956);

McCaw v. Fase, 216 F.2d 698, 700 (9th Cir., 1954),  
cert. den. 348 U.S. 927, 75 S.Ct. 339 (1955).

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APPELLANTS' DISREGARD OF THE RULES  
GOVERNING APPEALS WARRANT DISMISSAL  
OF THEIR APPEAL

Rule 17.6 of the Rules of this Court provides in part that: "in all cases, . . . the appellant . . . , upon the filing of the record in this court, shall file with the Clerk a concise statement of the points on which he intends to rely."

The instant record on appeal was filed in this court on March 8, 1961, five months after it was due. (Tr. Rec., pp. 32-33.)

Rule 73(c) of the Federal Rules of Civil Procedure provides in part that: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required." Appellants have never filed a bond on appeal.<sup>3</sup>

This Court has remarked more than once that ". . . attorneys should make an attempt to conform to the rules and not try to improvise new practice." See Hargraves v. Boudin, 217 F.2d 839, 840 (9th Circ., 1954). It is

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<sup>3</sup> It is noted that while appellants moved for permission to proceed upon typewritten briefs, permission to proceed in forma pauperis (28 U.S.C. § 1915) was neither sought nor granted.



IN THE UNITED STATES COURT OF APPEALS

IN AND FOR THE NINTH CIRCUIT

FEB 26 1969

HAROLD JACKSON,

Appellant,

vs.

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

Appellee

No. 19052

BRIEF OF APPELLEE

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	<u>TOPICAL INDEX</u>	<u>Page</u>
JURISDICTIONAL STATEMENT		1
STATEMENT OF THE CASE		2
THE ALLEGATIONS OF THE PETITION		7
THE RETURN		8
STATEMENT OF FACTS		9
SUMMARY OF THE ARGUMENT		31
ARGUMENT		
I HABEAS CORPUS DOES NOT LIE TO RELITIGATE QUESTIONS WHICH HAVE BEEN RAISED AND DETERMINED ON A DIRECT APPEAL		31
II APPELLANT HAS FAILED TO EXHAUST HIS STATE REMEDIES		32
III BY THE FAILURE TO SEASONABLY RAISE THE FEDERAL QUESTION, APPELLANT HAS WAIVED ANY RIGHT TO DO SO		33
IV ARTICLE 6, SECTION 4 $\frac{1}{2}$ OF THE CALIFORNIA CONSTITUTION IS NOT IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION		34
V APPELLANT WAS NOT DENIED A FAIR AND IMPARTIAL TRIAL		39
VI THE DISTRICT COURT PROPERLY REFUSED TO GRANT A HEARING		40
CONCLUSION		41
CERTIFICATE OF ATTORNEY FOR APPELLEE		42



<u>Cases</u>	<u>INDEX OF AUTHORITIES CITED</u>	<u>Page</u>
Application of Lyda, 154 F.2d 237		39
Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469		31, 33, 34
Buchalter v. New York, 319 U.S. 427		39
Chavez v. Dickson, 280 F.2nd 727		38, 40
Carter v. Illinois, 329 U.S. 173, 67 S.Ct. 216, 91 L.Ed. 172		33
Darr v. Burford, 339 U.S. 200, 94 L.Ed. 761, 70 S.Ct. 587		33
Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387		33
Fay v. Noia, 9 L.Ed.2d 837, 371 U.S. 391, 83 S.Ct. 822		33
In re Bine, 47 Cal.2d 814, 306 P.2d 445		31
In re Dixon, 41 Cal.2d 756, 264 P.2d 513		31
In re Lindley, 29 Cal.2d 709, 177 P.2d 918		32
In re Manchester, 33 Cal.2d 740, 204 P.2d 881		31
In re Porterfield, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675		32
In re Swain, 34 Cal.2d 300, 209 P.2d 793		32
In re Winchester, 53 Cal.2d 528, 348 P.2d 904		31, 32, 37
Irvin v. Dowd, 359 U.S. 200, 3 L.Ed. 900, 79 S.Ct. 825		33
Jackson v. California, 370 U.S. 964, 8 L.Ed.2d 830, 82 S.Ct. 1591		5
Jennings v. Illinois, 342 U.S. 104, 96 L.Ed. 119, 72 S.Ct. 123		33
Leonard v. Hudspeth, 112 F.2nd 121		39
Michel v. Louisiana, 350 U.S. 91, 100 L.Ed.83, 76 S.Ct. 158		33
People v. Arends, 155 Cal.App.2d 496, 318 P.2d 532		37
People v. Berry, 43 Cal.2d 838, 279 P.2d 18		32
People v. Cowan, 44 Cal.App.2d 155		38
People v. Dorman, 28 Cal.2d 846, 172 P.2d 686		37
People v. Elliot, 54 Cal.2d 498, 6 Cal.Rptr 753, 354 P.2d 225		37
People v. Furtado, 57 Cal. 345		35
People v. Hollins, 164 Cal.App.2d 191, 330 P.2d 246		37
People v. Jackson, 44 Cal.2d 511, 282 P.2d 898		2, 4, 9



INDEX OF AUTHORITIES CITED (cont'd)

	<u>Page</u>
People v. Moore, 103 Cal. 508, 37 P. 510	35
People v. Murphy, 47 Cal. 103	35
People v. Musumeci, 133 Cal.App.2d 354, 284 P.2d 168	37
People v. Muza, 178 Cal.App.2d 901, 3 Cal.Rptr 395	37
People v. Nor Woods, 154 Cal.App.2d 589, 316 P.2d 1010	32
People v. Richards, 136 Cal.127, 68 P. 477	35
People v. Robarge, 111 Cal.App.2d 87, 244 P.2d 407	37
People v. Rogers, 56 Cal.2d 301, 14 Cal.Rptr. 660, 363 P.2d 892	37
People v. Sansome, 84 Cal. 449, 24 P. 143	35
People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934	36
People v. Stanley, 47 Cal. 113, 17 Am.Rep. 401	35
People v. Tucker, 164 Cal.App.2d 624, 331 P.2d 160	37
People v. Williams, 18 Cal. 187	35
Rose v. Dickson, No. 18670, U.S.Circuit Court, 9th District	32
Sampsell v. People of State of California, 191 F.2d 721	38
Schechter v. Waters, 199 F.2d 318	32, 39
Smith v. United States, 187 F.2d 192	39
Sunal v. Large, 332 U.S. 174, 91 L.Ed. 1982, 67 S.Ct. 1588	31, 39
Townsend v. Sain, 83 S.Ct. 745	40
 <u>California Codes</u>	
Penal Code 182	2, 8
Penal Code 209	2, 8
Penal Code 1239	3
Penal Code 1258	35
Penal Code 1404	35
 <u>California Constitution</u>	
Art. 6, § 4½	7, 8, 34-35, 38
 <u>Federal Rules of Criminal Procedure</u> , Rule 52	
	38
 <u>Judiciary &amp; Judicial Procedure</u>	
Title 28, U.S.C.A. § 2111	38
Title 28, U.S.C.A. § 2253	2
 <u>United States Constitution</u> , 14th Amendment	
	5, 6, 8



IN THE UNITED STATES COURT OF APPEALS  
IN AND FOR THE NINTH CIRCUIT

HAROLD JACKSON, }  
Appellant, }  
vs. } No. 19052  
THE PEOPLE OF THE STATE OF }  
CALIFORNIA, }  
Appellee }

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BRIEF OF APPELLEE

- - - - -  
JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court, for the Northern District of California, Northern Division, entered on May 9, 1963, dismissing the petition for writ of habeas corpus and denying an application for the appointment of counsel to represent the appellant.

On May 17, 1963, appellant filed a motion for a certificate of probable cause. This was denied by the District Judge on May 22, 1963, on the ground that the proposed appeal was without merit and was not taken in good faith.

On June 5, 1963, appellant requested from this Court a certificate of probable cause. By its order of



December 18, 1963, this Court granted the certificate of probable cause. The jurisdiction of this Court was invoked pursuant to the provisions of Title 28, U.S.C., section 2253.

#### STATEMENT OF THE CASE

The Grand Jury of the City and County of San Francisco by Indictment Number 49780 charged the defendants, Harold Jackson and Joseph Lear, with kidnaping for ransom and reward one Leonard Moskovitz, who was subjected by said defendants to bodily harm (Pen. Code § 209). Both defendants were further charged with conspiring to commit the crime of kidnaping for ransom and reward (Pen. Code § 182). Also it was alleged that at the time of the commission of said offenses both defendants were armed with a deadly weapon. Appellant Jackson was charged with a prior felony (\*CT 2:4-6:20).

On February 1, 1954, the defendants were arraigned (CT 7:16).

On February 9, 1954, defendant Lear interposed a motion to quash (CT 8:3). Appellant Jackson interposed the same motion to quash on February 11, 1954. Both motions were denied (CT 8:18). The defendants then entered pleas of not guilty (CT 10:14). Defendant Lear entered a motion

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\*"CT" refers to Clerk's Transcript in  
People v. Jackson, 44 Cal.2d 511,  
282 P.2d 898.



for a continuance to April 5, 1954, which was denied by the court (CT 11:1).

Trial began on March 23, 1954 (CT 11:7).

On May 6, 1954, the jury found defendants guilty on both counts, and further found that Leonard Moskovitz was subjected to bodily harm and that defendants were armed with a deadly weapon at the time of the commission of the offenses. It was also held that appellant Jackson had previously been convicted of a felony (CT 148:3-150:20).

The defendants made a motion for a new trial and motion in arrest of judgment (CT 15:1-4) which were denied by the court (CT 153:1).

On June 8, 1954, notice of appeal was filed by defendant Lear (CT 156:1).

The appeal of appellant Jackson was automatic, as the death penalty was imposed against him (Cal. Pen. Code § 1239). On that appeal the following contentions were raised by the appellant:

1. That the court erred in its instruction with respect to "bodily harm".

2. That the district attorney was guilty of prejudicial misconduct in his argument to the jury.

3. That the court was guilty of error in questioning a defense witness.

4. That the court was guilty of error in impugning the good faith of counsel to the prejudice of



the appellant.

5. That error was committed by allowing evidence of other crimes.

6. That error was committed by allowing into evidence certain statements of the appellant.

7. That error resulted from the cross-examination of the appellant.

The judgment upon all counts of the indictment was reversed with directions to the trial court to impose upon each defendant a sentence of life imprisonment for the crime of kidnaping for the purpose of ransom. The orders denying the defendants' motion for new trial were affirmed (People v. Jackson, 44 Cal.2d 511, 282 P.2d 898). Petitions for a rehearing were denied on May 25, 1955. No attempt was made to obtain certiorari from the United States Supreme Court. On July 22, 1955, a new judgment was entered in accordance with the order of the California Supreme Court.

On November 21, 1961, the appellant filed a petition for a writ of habeas corpus with the California Supreme Court, Crim. No. 7032 on the records of that court. In that petition he alleged: he was denied his right to a fair and impartial trial, and deprived of due process of law, because of the trial judge's and the district attorney's misconduct and by the admission of evidence of other



crimes and statements of the appellant relating to homosexual relations which existed between appellant and the victim. That petition was denied on December 19, 1961. A petition for rehearing was denied on January 17, 1962. On February 6, 1962, the appellant filed a petition for writ of certiorari from the United States Supreme Court to review the California Supreme Court's denial of his petition for habeas corpus. A response was requested by and filed with the Court. Certiorari was denied on June 25, 1952 (Jackson v. California, 370 U.S. 964, 8 L.Ed.2d 830, 82 S.Ct. 1591).

On August 8, 1962, appellant filed the instant petition for writ of habeas corpus in the United States District Court, for the Northern District of California, Northern Division, Number 8573 on the files of said court. In that petition it was asserted that appellant herein had been denied his rights under the Fourteenth Amendment of the United States Constitution, in that the misconduct of the trial judge and the district attorney during the trial deprived him of a fair trial.

On November 15, 1962, an order to show cause was issued.

On December 6, 1962, the respondent Warden made his return and motion to dismiss and lodged with the District Court the records of appellant's previous legal actions in the State and Federal courts.



On May 9, 1963, the District Judge issued his order dismissing the petition. In granting the motion to dismiss, the District Court held that although the conduct of the trial judge and the district attorney was not to be condoned, and could certainly stand independently to sustain a reversal and the granting of a new trial, the conduct was not so gross, in considering the record as a whole, as to rise to constitutional proportions. The court stated that certainly the remarks, considering the whole record and length of the trial (the trial lasted from March 29, 1954, to May 4, 1954) were not sufficient to move a federal court to hold over the judgment of the state supreme court that the trial was unfair to the point of violating the Fourteenth Amendment to the Constitution of the United States or in violation of any other section of that document.

Further, the District Court pointed out the record contains the account of many demonstrations, contemptuous conduct, vulgarity, and disrespect for the law and the court on the part of appellant. The case hinged on the credibility of the victim as opposed to the credibility of appellant. When appellant denied his own mother and brother (the brother appeared in court for visual identification and similarity, and testimony as to appellant's true identity), his testimony was shown to be completely untrustworthy in this regard (as well as other points throughout the trial),



and the jury had a clear course. The ill-considered remarks by the court and the prosecutor could add very little to the inevitability of a judgment of conviction brought about by appellant's own conduct. The principal complaint of appellant to the trial judge's remarks were associated with the death penalty. The Supreme Court of California has, however, reversed the death penalty, thus eliminating the prejudicial sting of those remarks. What is left is hardly more than what might well be expected from a prolonged, heated and tense trial, especially in view of appellant's deportment therein.

On May 17, 1963, appellant sought a certificate of probable cause from the District Court. On May 22, 1963, that court denied it on the grounds that the proposed appeal was without merit and not taken in good faith.

On June 5, 1963, appellant addressed to this Court a motion to proceed in forma pauperis for a certificate of probable cause and for the appointment of counsel. This Court by its order of December 18, 1963, granted the certificate of probable cause.

#### THE ALLEGATIONS OF THE PETITION

The appellant in his petition alleged the following:

1. That the California Supreme Court sanctioned the denial of a fair trial by the use of Article 6, section 4½ of the California Constitution.



2. That Article 6, section  $4\frac{1}{2}$ , of the California Constitution is unconstitutional.

3. That the denial by the Supreme Court of the State of California of a petition for habeas corpus without a hearing, without an opinion, without taking testimony, and requiring respondents to answer, was a denial of procedural due process of law.

4. That appellant was denied due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

#### THE RETURN

The return to the order to show cause and motion to dismiss set forth the judgment under which appellant was held, that is, kidnaping for ransom and reward in violation of California Penal Code section 209. The appellee also lodged copies of the state court's records with the District Court. From these documents it appears that the appellant was indicted by the Grand Jury of the City and County of San Francisco for kidnaping for ransom and reward in violation of Penal Code section 209, and with conspiracy to commit the crime of kidnaping for ransom in violation of Penal Code section 182.

Appellant entered his pleas of not guilty to each count and the trial began on March 23, 1954 (CT 11). At that trial the following facts were established, as is



reflected by the Reporter's Transcript of the trial lodged with the United States District Court.

#### STATEMENT OF FACTS

In 1939 or 1940 Jackson and Lear met for the first time while both were employed by the Prather Detective Agency (\*RT 1366). They renewed their acquaintanceship again in 1953 (RT 1376:20). After a short time, Jackson - according to Lear - asked Lear to work on a case for him (RT 1379:1), but never told him that it was to be a kidnaping (RT 1386:5). Jackson, however, testified that he had discussed the kidnaping with Lear (RT 986:1). He stated he told Lear that the latter would receive \$50,000 for his part in the kidnaping (RT 989:7) and Lear agreed to go through with it (RT 990:14).

On January 6, 1954, Ed Shapiro was contacted by Jackson (RT 799:17) and told either to pay the latter \$600 or he would release information as to Shapiro's past record (RT 812-814). As Shapiro was then being tried before the federal court for income tax evasion, he paid the money out of fear of disclosure (RT 817:4). Jackson claims he received \$1250 from Mr. Shapiro (RT 1002:14), but that it was paid to investigate the jury in the Shapiro case (RT 1003:7). He did not perform this duty (RT 1003:14). Also, it might be pointed out that at that time the jury had already been

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\*"RT" refers to Reporter's Transcript in  
People v. Jackson, 44 Cal.2d 511,  
282 P.2d 898



sworn (RT 1004:7).

On this same day - January 6 - Jackson claimed that he saw Leonard Moskovitz (henceforth referred to as Leonard), at about 2 p.m. at the City Hall (RT 995:23-996:7). Leonard did not see him on that date (RT 1836:13), for on that day he was a pallbearer (RT 1845:16).

On Monday, January 11 (RT 1005:18) or Tuesday, January 12, 1954, (RT 1386:8), Jackson and Lear came to San Francisco.

On Wednesday morning (RT 1416:16) Jackson and Lear drove to San Jose (RT 1409:17); Jackson had a list of items and sent Lear in to purchase them. They purchased two lengths of chain (RT 1410:25), two pieces of pipe (RT 1411:1-16), two wrenches (RT 1414:13), two pairs of rubber gloves (RT 1415:1), a blanket (RT 1415:10), and nuts and bolts (RT 1414:2). On Wednesday morning Lear's car was exchanged for one that was less conspicuous (RT 1420:19).

At about 3 p.m. (RT 1853:15) on Wednesday, January 13, Jackson went to Leonard's office. He introduced himself as "Mr. Lund" (RT 81:8), and informed Leonard that he wanted to purchase a home in a high-class district (RT 80:11). A particular home was suggested which Jackson said he would look at (RT 80:16), and at which he did look (RT 1015:6). Later that day Jackson called to make an appointment with Leonard to see the



house on the following Saturday (RT 81:3). Jackson claimed that this meeting took place at about 1:15 p.m. (RT 1012:21). Leonard was attending a Golden Gate Exchange Club luncheon at the Fairmont Hotel at that time (RT 1839:11) and remained there until about 2:15 p.m. (RT 1842:1; 1890:2-1891:6; 1893:19-1894:24; 1896:7-1897:14; 1902:14-24; 1943:12-1945:7). Jackson claimed that about 2:10 p.m. (RT 1012:21; 1014:21, 1015:12; 1016:3) he met Leonard at 16th and Geary (RT 1016:5), and they went to the Beach and ate (RT 1016:8-14), arriving there at about three o'clock (RT 1270:21). At this time Leonard was supposed to have been wearing a sports shirt (RT 1272:12), but that afternoon he was wearing a white shirt and tie (RT 1844:26), at least while at the luncheon (RT 1891:7; 1897:15; 1903:2; 1946:17).

A defense witness, Mrs. Opal Barnes, testified that she served Jackson and Leonard at the Pie Shop at the Beach at about 3:00 o'clock on January 13 (RT 1288:15-1293:21). But, on a previous occasion she stated that she had never served Jackson and Leonard (RT 2037:17). According to Mrs. Barnes, Leonard was wearing a sports shirt at that time (RT 1290:7). As already pointed out, Leonard was not wearing a sports shirt that day. Certain parts of the testimony of this witness are of particular interest. Although she merely served them and did not



converse with them (RT 1291:10), she remembered that they had apple turnovers and coffee (RT 1291:17), how Jackson and Leonard were dressed (RT 1316:26-1317:8), and - in particular - she was able to describe the plaid of Leonard's shirt in detail (RT 1331:24-1332:22), that they went to their car which was parked in the center of the street, and there ate this food (RT 1291:25). Consider also, that Mrs. Barnes could not identify Mr. Lear (RT 1309:4), although Mr. Lear frequently ate at the Pie Shop (RT 1606:22; 1607:2). The explanation is simple, Leonard was not there that afternoon (RT 1837:14).

Jackson testified that he talked to Leonard for about two hours on that Wednesday afternoon which would have been until after five o'clock (RT 1020:16). But, at around four that afternoon Jackson was at 175 Arbor Street (RT 1794:17).

At this time Lear . is supposed to have given Jackson a list of items which he was to purchase for use in the kidnaping (RT 1016:17), but Lear said these items were purchased Wednesday morning. Jackson himself said that they were purchased on the morning the down payment on the house was made (RT 1021:20) which was Wednesday (RT 1789:19).

On one night that week, Jackson and Lear, in furtherance of their conspiracy, went to the Southern



Pacific Depot to determine if a person could stand on the back platform of the Starlight (RT 1258:10). Lear told some railroad official that he wanted to take pictures from that platform and wondered if he could stay on it during the trip (RT 1259:4; 1933:3).

One evening Jackson rode the Starlight to San Jose in order to determine if a person could ride on the platform, which he was allowed to do (RT 1022:4-20). Lear met Jackson in San Jose that night and they returned to San Francisco (RT 1022:21).

On Friday night, Lear was sent to a prearranged spot south of Sunnyvale, while Jackson took the Starlight again (RT 1023:21). Jackson rode on the platform of the train and, when Lear signaled, dropped a bundle of newspapers off the train (RT 1024:2-24). This was to test their plan for obtaining the ransom.

Saturday morning Lear took Jackson to the City Hall (RT 1422:7) from where he made a telephone call to Leonard (RT 1025:14) and told him he desired to look at the house that morning (RT 81:16). Plans were made for Leonard to pick up Jackson at the City Hall about 11 a.m. (RT 82:25), which he did (RT 86:10). Jackson then asked Leonard to pick up his wife and to meet his brother at the latter's home (RT 86:18). Leonard drove to Arbor Street, as directed by Jackson. Jackson told Leonard to park the car a short distance away from 167 Arbor Street, which



was their destination (RT 88:13). They then went to the front door of the house, Jackson being careful to stay behind Leonard (RT 88:23). The door was opened, but by whom Leonard was uncertain, for the person stepped behind the door. Once inside, Jackson pushed Leonard onto the couch and grabbed his arms (RT 89:9). Lear rushed at Leonard with a knife which he held against his throat, saying, "One peep out of you and you are dead" (RT 91:3; 92:4). Leonard attempted to rise, but Jackson held him down (RT 94:9), cautioning him to behave and he "won't be hurt" (RT 94:18). Lear then said, "I have got this knife and I am ready to use it" (RT 94:20). Jackson then armed himself with a piece of pipe (RT 94:21) which he held over Leonard's head while Lear procured some chains (RT 95:19) which he put around Leonard's ankles and wrists (RT 97:3) and fastened as tightly as possible (RT 100:6; 101:14) with nuts and bolts (RT 97:12). Leonard's watch (RT 102:33), wallet and papers (RT 112:7), and the keys to his car (RT 117:10) were taken. Leonard pleaded to be freed and asked Lear to think of his (Leonard's) wife and children (RT 116:8). Lear retorted by telling him to "cut out the bullshit" (RT 116:18). Jackson, on discovering that there was little money in the wallet, was extremely disappointed and complained bitterly (RT 116:20). The contents of the wallet were destroyed (RT 117:24).



At this time, Jackson told Leonard that he had been kidnaped and was being held for \$500,000 ransom by a gang of five, and, further, that he was to write a ransom note; with that, Lear went and got a pad upon which to write the letter (RT 118:5). A coffee table was moved over to the couch where Leonard was sitting and Lear dictated the first ransom note (RT 120:25) from a piece of paper which he had (RT 120:21; 122:1). Before this letter was written, and while it was being written, Jackson informed Leonard that they had orders to kill him if he made the slightest attempt to escape (RT 121:8).

That first ransom note informed Leonard's father that he was being held for \$500,000 ransom and would be killed if it was not paid. It informed him of how contact was to be made through the newspapers and the denominations in which the money was to be paid. There was also included in the letter a drawing of a suitcase, which Lear helped finish (RT 124:2-4). All of this time Lear was wearing rubber gloves (RT 127:1).

Leonard was then forced to hobble into the bedroom and to lie down on the bed (RT 128:26). Lear warned him that he could hit a bull's eye at forty paces with a knife, so not to attempt an escape. Further, Jackson pointed out that even if he got out of the house there were three other members of the gang outside who would get him (RT 128:15).



Lear left the bedroom and, when he returned, had some adhesive tape and ear plugs (RT 129:9). The ear plugs and toilet tissue were put in Leonard's ears which were then taped (RT 129:20). A large piece of tape was also placed over his mouth (RT 129:23). Lear tied him to the bed (RT 129:26), while Jackson stood guard over him with the lead pipe, telling him that if he attempted to resist, his skull would be crushed (RT 130:22). Saucers containing the adhesive roll and cover were balanced on Leonard's knees, so that if he moved they would rattle and alert his kidnapers (RT 133:24). Jackson warned that any outcry would result in death (RT 133:17). Two bureaus with mirrors were arranged in such a way that anyone in the living room could see any move made by Leonard (RT 134:9-135:7).

Jackson then left the house and was gone for two to three hours (RT 1435:4). During that time he took Leonard's car to the Rincon Annex where he mailed the ransom note (RT 1036:8). From there he took the car to Union Square Garage where he left it (RT 1036:12). This was only one of three occasions on which Jackson left Lear and Leonard alone (RT 1695:18). This ransom letter was received by Leonard's father that afternoon (RT 19:23).

Leonard remained tied to the bed all Saturday afternoon (RT 144:3); all of that time he was under constant surveillance by Lear and Jackson (RT 144:9). At one time that afternoon when the doorbell rang, Lear rushed in



and put a pillow over Leonard's ears and threatened to crush his skull if he made any outcry (RT 144:16).

When it was beginning to get dark, Leonard was taken into the living room (RT 145:25) by Lear, who was armed with a knife, and Jackson, who was carrying a piece of pipe (RT 147:8). Leonard was chained to the dining room table (RT 147:20). Again, Leonard was warned against attempting to escape and reminded of the rest of the gang (RT 148:15). He was then fed some beans, coffee, and a cookie (RT 149:20). All three listened for news of the kidnaping, and when none was forthcoming they said that so far he was very lucky. All this time neither Lear nor Jackson showed any tenseness or nervousness (RT 150:6).

About ten o'clock Jackson got a mattress which he threw on the living room floor (RT 150:15). Lear tied Leonard to it (RT 151:13) in a spread-eagle fashion (RT 150:23). Leonard did not sleep that night because of his fear (RT 152:24). During the night Jackson and Lear took turns guarding him (RT 153:3). He remained thus bound throughout that night (RT 151:25).

Sunday morning, Leonard wrote a second ransom note while still on the mattress (RT 155:9). Mr. Lear dictated this letter from a piece of paper he had in his hand (RT 155:23). This letter was a general plea to Leonard's father to comply with the kidnapers' wishes (RT 157:14-158:18). At Lear's direction (RT 157:2), an



envelope was addressed to Leonard's father (RT 158:22), and, again at Lear's direction, the letter was placed in the envelope and sealed (RT 159:2). Again Lear wore rubber gloves (RT 159:11). This letter was received by Leonard's father (RT 22:21-23:11).

After breakfast Leonard was again taken to the bedroom (RT 159:16), placed on the bed, and again lashed to it, gagged, and his ears stuffed (RT 161:6-23). Leonard remained on the bed until early afternoon (RT 163:6). He was then taken to the dining room, chained to the table, and given something to eat (RT 165:13). After this lunch Leonard was returned to the bed and tied as before (RT 166:10). That afternoon Lear went out of the house and purchased a newspaper (RT 1443:9). This was one of at least five trips which Lear made out of the house alone (RT 1443:25). After dark Lear and Jackson awakened Leonard and showed him the ad in the Examiner notifying them of his father's inability to raise the ransom. They were quite angry when they heard that the money could not be raised (RT 167:1).

Leonard was then told to write a third letter in which the ransom would be reduced to \$300,000. Again, Lear dictated this letter (RT 172:26). The letter begged Leonard's father to raise \$300,000 immediately, warning that otherwise they would kill their victim. It also informed him that already some of them wanted to "send you



my testicles to put pressure on you" (RT 173:22-174:15). Leonard's father received this letter (RT 23:21-24:7). Jackson and Lear did not stop with one letter. Leonard was told that the boss wanted him to write a number of letters at that time (RT 171), which Lear then dictated (RT 176:24).

The next letter told in detail how the ransom was to be dropped from the back of the Starlight when a signal was given with green-and-red lights (RT 177:12-178:6). This letter was written in duplicate (RT 178:8). Envelopes for these letters were also then addressed by Leonard (RT 179:1).

At this time Leonard protested that the plan was too complicated and his father would become confused, but, further, his father, because of ill health (RT 179:12), could not make the trip. Jackson said, "Never mind, this plan has been tested and it is foolproof" (RT 180:19), but Lear expressed misgivings.

Still another letter was written. It directed the father to return to San Francisco if he failed to see the signals on the trip down (RT 181:1-183:23). Lear dictated this letter (RT 184:23).

Leonard, at this time, began to attempt to sell the idea - at least to Lear - that this plan was too complex, with the hope that by so doing he would be allowed to remain alive (RT 181:10).



Still another letter was written. It dealt with the details of Leonard's release (RT 185:10). Lear dictated this letter (RT 186:12). These letters were not dated (RT 186:22).

Leonard was then given dinner (RT 188:17), after which he was again tied to the mattress (RT 190:7). Lear and Jackson that night stood guard, alternately, as on the previous night (RT 191:12).

Monday morning Leonard was released from the mattress by Jackson (RT 192:7) and taken to the table (RT 192:24). Leonard then planted the idea in Lear's mind that some arrangement could be made for the transfer of money through Leonard's brother (RT 193:4). He kept repeating this new idea to Lear (RT 195:6) until he was put back in the bedroom (RT 195:17). He remained lashed to the bed until he was again given some food (RT 186:3) and then returned to the bed (RT 197:16), and remained there until dark (RT 198:8).

At about noon on that Monday, Lear left the house and called the Moskovitz Realty Office (RT 1451:20) from downtown (RT 1451:26). Leonard's brother, Alfred, received this call (RT 466:13). He was told by Lear to raise \$300,000 by the next night (RT 467:4).

That evening Leonard was taken to the dining room and shown an Examiner (RT 199:8), which contained an ad informing them that the money was ready (RT 199:17).



But Jackson warned that Leonard was still in danger of losing his life (RT 200:3). This prompted Leonard to suggest another plan for obtaining the ransom (RT 201:23). Leonard was then fed, but was too nervous to eat, so he just kept talking of his plan (RT 202:21). Lear thought that the offered plan was good (RT 203:7). Leonard was then sent to the bedroom; he was not chained, but he was threatened and warned not to attempt to escape, for the gang was still present and he was under constant surveillance (RT 203:16). Lear and Jackson then engaged in a heated discussion (RT 204:13); indeed, they became abusive with one another (RT 1682).

Then Lear and Jackson told Leonard that they were going to allow him to telephone his brother. He was taken to the car and forced to lie down on the back floor (RT 206:4) of the two-door sedan (RT 207:13). After they had gone a few blocks, Leonard was allowed to sit up (RT 207:19). Jackson warned him not to try anything, as he had a rod with him (RT 209:4). Leonard saw some object in Jackson's belt that he thought was a gun (RT 209:14). Finally they stopped at a telephone booth on Portola Drive (RT 208:22). Lear and Leonard went to the booth (RT 209:21). Lear was armed with his knife and Jackson said that he would keep the door open so that if Leonard attempted a break he could shoot him (RT 209:16).

Leonard called his brother's office (RT 209:24)



and spoke to him. All of this time Lear was listening to the entire conversation (RT 211:11). After Leonard answered a number of questions to identify himself and asked if Alfred had the money (RT 212:11), Lear took over the conversation (RT 212:25) and said that he would call Alfred back later (RT 213:7). They returned to the car (RT 213:17). Jackson was in a rage because they had talked for so long (RT 213:20). Lear just told him to "take it easy" (RT 213:25). Again Leonard was forced to lie on the floor (RT 214:7) and they returned to the house. All three went into the dining room (RT 214:25) where Lear asked Leonard what his plan was for the payment of the money. Leonard, on the spur of the moment, attempted to think of some plan (RT 215:10). He attempted to convince his kidnapers that his brother would hand over the money to them (RT 215:23). Lear told him not to forget that there were others in the gang and that if Leonard slipped he could expect a bomb thrown through his window which would injure his children (RT 217:14).

During one of these conversations, Lear asked Leonard if the latter would be willing to rendezvous with him and give him (Lear) his (Lear's) share of the ransom (RT 1549:2; 1555:5; 1728:21-1729:4; 1851:13). In fact, Lear said, "I am willing to take \$50,000" (RT 1877:18). Lear claims now that he was not really interested in his



share of the ransom (RT 1555:20), but merely asked for it so, "In the eyes of Mr. Jackson I would not have looked like a fool offering to walk out without anything. I was trying to get out of it as sensibly as I possibly could, and get Lennie out of it too."

Jackson told Leonard that even now he "might still be killed" (RT 218:18).

Jackson then told Leonard to return to the bedroom, but didn't chain him because he believed that by now Leonard had been warned sufficiently against attempting any escape (RT 220:20). Jackson paced back and forth between the bedroom and the hall (RT 221:1). After some time, Jackson muttered, "Where is that guy? He should have been back—" and then, "This whole plan is crazy! He should have left us stick by the other" (RT 221:23).

After the conversation about the new plan, Lear left the house and again called Leonard's brother, Alfred, at about 2:30 a.m. on Tuesday, January 19 (RT 472:13-473:6). Lear first asked if the phone was tapped (RT 476:3). He then inquired as to the bank used, how long it would take to get the money (RT 477), and was told that the money would be ready by 11:30 a.m. that day, and was assured that the money would not be marked but would be in old bills. Lear then said that some one was coming, and he would have to call back (RT 478) tomorrow.

Lear was seen by two police officers while he was



making this call (RT 540:2). When the car stopped (RT 540:10), Inspector Nelder ran across the curb and grabbed the telephone out of Lear's hand (RT 492:19), and checked as to where the call was being made. When it was discovered that the call was to the Moskovitz family, Lear was arrested (RT 493:4).

At first, Lear denied any knowledge of the kidnaping (RT 495:4), but finally broke down and told the police the address where Jackson was holding Leonard (RT 497:11), but he warned them "not to miss" for "that part in the letter about cutting him up is no joke" (RT 498:8). Police reinforcements were requested (RT 499:11). Lear described the house, and informed the police that with his help they could get Jackson (RT 499:22). Lear then made an outline of the house (RT 500:1). In the meantime, the other police had arrived (RT 501:5). Lear and one of the officers left the group of officers who were approaching the house and entered the garage. Lear knocked at the back door, which Jackson opened; as he did, the officer lunged forward and captured him.

Lear said that there were no guns in the house, but that Leonard thought they were armed (RT 501:19-502:19). Lear had in his possession at the time of his arrest Leonard's wallet and a letter (RT 502:20 which contained instructions for Alfred, Leonard's brother, on



how to deliver the ransom money (RT 507:2-21).

When Leonard heard the commotion caused by the entry of the police he jumped off the bed and ran into the closet (RT 222:11), for he thought it was "the gang" coming to kill him (RT 288:3). When he heard the men who were running throughout the house yell, "Lennie, Lennie" he emerged from the closet, asking, "Are you part of the gang or are you policemen?" (RT 222:24). At the time of his release, Leonard's wrists had marks on them which showed that they had been chained (RT 629:7).

During the time Leonard was held prisoner, Jackson and Lear were very friendly toward each other (RT 1850:24), and neither one appeared to be in fear of the other (RT 1850:26-1851:3); nor did one seem to dominate the other (RT 1851:4).

After his arrest, Lear informed the police in detail of all that had transpired (RT 640:6-691:18). In substance, this statement is a reiteration of all of the facts above enumerated. He admitted: that he chained Leonard (RT 650); that Leonard was ordered to write a ransom note (RT 651:10); that Leonard was then lashed to the bed (RT 661:14) with his ears stuffed and taped and his mouth taped shut (RT 662:11); also saucers with the adhesive containers were balanced on his knees (RT 663:15); that he threatened Leonard with a knife and warned him to go along with them - "or else" (RT 666:6); that Jackson



took Leonard's car to Union Square and left it there after mailing the first ransom demand (RT 657:13); that Leonard was tied to a mattress (RT 668:12) in a spread-eagle fashion (RT 669:5) and left that way all of Saturday night (RT 669:10); that Sunday, Leonard was shackled and lashed in bed (RT 669:14); that Leonard wrote a second ransom note on Sunday which Lear dictated (RT 670:1); that the drafting of these notes was a joint undertaking of Jackson's and Lear's (RT 671:11); that on Sunday night Leonard was forced to write several ransom notes (RT 672:8); that he called Leonard's brother (RT 678:1) and said that \$300,000 would be considered as ransom rather than \$500,000 (RT 678:10); that he constantly carried a piece of pipe to impress Leonard and to fill him with fear (RT 678:18); that Jackson gave way to Lear with regard to the plan for the receipt of the ransom (RT 679:5); that Leonard was always chained until they took him out on Monday night to make the telephone call (RT 680:19).

Jackson also made a statement on the day of his arrest (RT 692:8); when told of Lear's statement, he said that it was partly true (RT 695). He did deny mailing the ransom note (RT 697:15).

Lear was then brought in and questioned in Jackson's presence (RT 698:10). Lear was again asked about the purchase of the items used in the kidnaping, about the



ransom notes (RT 700); Jackson denied that he had Lear purchase these items (RT 701:7), but made no comment with regard to the other statements (RT 701:16). Jackson, when asked if he wanted to tell the truth, retorted, "Do you want me to be a stoolpigeon like he is?" (RT 702:1).

During this questioning, Jackson would not admit any complicity in the transaction (RT 702:3). He did say that Leonard had never been chained (RT 702:11). He denied that he ever mailed any of the ransom notes (RT 702:21).

Late at night, Tuesday, the 19th, Lear and Jackson were taken to 167 Arbor Street to re-enact the tying and shackling of Leonard (RT 706:5). Leonard and Jackson showed how they had entered (RT 726:12). Leonard said that Jackson had told him to sit down on the chesterfield; Lear said that this was true (RT 727:12); Jackson was silent (RT 727:17). The taking of the wallet was admitted by Lear (RT 728:9); but Jackson denied that he had taken the wallet (728:12). Lear repeated Jackson's statement to the effect that it was like a Jew not to have any money on him (RT 728:17). Jackson denied this statement (RT 729:1). Lear put the chains on Leonard as he said he had at Jackson's command (RT 729:23). Jackson remained silent (RT 730:9). Lear stated that Leonard wrote the ransom note dictated by Lear from a letter prepared by Jackson (RT 734:9); Jackson said nothing (RT 734:25). Lear tied Leonard to the bed in exactly the same manner that he was tied while he was held



prisoner (RT 736:2); Jackson said nothing (RT 744:13); Lear tied Leonard to the mattress as he had during the kidnaping (RT 751:14); Jackson did not deny the charge that he and Lear had thus tied Leonard (RT 751:22).

After his arrest, Lear wrote to Leonard and his family, stating that he regretted what had happened and expressing his belief that Leonard was one of the "gamest little guys," for Lear knew what he had gone through, as he himself had been in fear of reprisal on his own wife and child (RT 1715:5).

Throughout the trial Lear claimed that he acted out of fear that Jackson would take his life (RT 1718:2), although Lear was often armed, himself, at the house (RT 1718:19-24). Also, he admitted that on five or six occasions he had gone out, leaving Jackson to guard Leonard at the house (RT 1443:25). Then, on three occasions Jackson had left the house (RT 1595:18) - on one occasion for two or three hours (RT 1435:4). Nor had Lear shown any tenseness or nervousness during the kidnaping (RT 150:6). Also, consider that Lear and Jackson seemed to be very friendly throughout the kidnaping (RT 1850:24) and Lear at no time appeared to fear Jackson (RT 1850:26).

Jackson admitted the kidnaping, but asserted that Leonard planned this entire thing because he was



heavily in debt. The facts show that such was not the case. The records of Dun & Bradstreet show that Alfred and his brother had a net worth of \$80,600 (RT 2278:18-2280:26). Leonard's standing with the Professional Conduct Committee of the San Francisco Real Estate Board and of the Multiple Listing Service was excellent (RT 2206:5). So excellent was his financial situation that Leonard and his brother could borrow \$10,000 and \$15,000 on an unsecured loan (RT 2233:12). Indeed, his business had been expanding in 1953 (RT 2267).

The following evidence is only a part of that which went to prove that Jackson was Hans Anderson, and thus guilty of prior felony with which he was charged.

1. He was identified by his brother, Peter Anderson, as Hans Anderson (RT 2147:3-23);
  2. He was identified by a former fellow inmate at San Quentin (RT 789:10-791:19);
  3. Jackson's handwriting and that of Anderson are identical (RT 2098:9);
  4. The fingerprints of Jackson and Anderson are identical (RT 2050:12);
- - - - -



5. Consider also the similarity of tattoos:

ANDERSON:

Right forearm: Outer arm

a. Sailor girl in Anchor

b. Red rose

(RT 1105:17; 1911:21-1912:21)

Inner arm

Three-masted ship

Left forearm:

Butterfly girl

(RT 1912:24)

JACKSON

Right forearm: Outer arm

a. Sailor girl and anchor

(RT 1100:11; 1101:8)

b. Rose

(RT 1100:19)

Inner arm

Three-masted ship

(RT 1099:24; 1101:6; 1279:24)

Left forearm

Woman with colored wings (RT 1106:3-16; 1280:10)



## SUMMARY OF THE ARGUMENT

Appellee contends that the action of the District Court in dismissing the petition was proper, for viewed in the light of the state court record, no substantial federal question was presented to the District Court, and hence there was neither a necessity for a hearing nor appointing counsel for appellant.

## ARGUMENT

### I      HABEAS CORPUS DOES NOT LIE TO RELITIGATE QUESTIONS WHICH HAVE BEEN RAISED AND DETERMINED ON A DIRECT APPEAL

It is established that habeas corpus may not be used either in the state or the federal court to raise questions which could and should have been, or were in fact, raised on appeal, for habeas corpus cannot be used as a second appeal (In re Bine, 47 Cal.2d 814, 817, 306 P.2d 445; In re Dixon, 41 Cal.2d 756, 759, 264 P.2d 513; In re Manchester, 33 Cal.2d 740, 742, 204 P.2d 881) and federal law (Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469; Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982; In re Winchester, 53 Cal.2d 528, 532, 348 P.2d. 904).

Thus it has been held that habeas corpus will not lie to review rulings of the trial court with respect to the admission or exclusion of evidence or to correct mere errors of procedure occurring at the trial or to review errors committed within the exercise of an admitted



jurisdiction (In re Winchester, 53 Cal.2d 528, 532, 348 P.2d 904; In re Lindley, 29 Cal.2d 709, 723, 177 P.2d 918; In re Porterfield, 28 Cal.2d 91, 99, 168 P.2d 706, 167 A.L.R. 675; Schechter v. Waters, 199 F.2d 318).

It is apparent that all of the alleged grounds now presented by the appellant were presented on an appeal to the California Supreme Court and were there ruled upon. What appellant attempts to do now is to obtain a second appellate review of such grounds. Such action cannot be tolerated.

## II APPELLANT HAS FAILED TO EXHAUST HIS STATE REMEDIES

As this Court recently held in Rose v. Dickson, No. 18670, the question of whether there has been an exhaustion of state remedies is one of law, which this Court may pass upon.

Under California law it is required that an application for a petition for writ of habeas corpus allege with particularity the facts upon which the petitioner would have a final judgment overturned and further that he fully disclose his reasons for delaying in the presentation of these facts (People v. Berry, 43 Cal.2d 838, 279 P.2d 18; In re Swain, 34 Cal.2d 300, 209 P.2d 793; People v. Nor Woods, 154 Cal.App.2d 589, 316 P.2d 1010).

In his petition for habeas corpus to the



California Supreme Court the appellant attempted to justify his delay by asserting that during the time since his conviction on April 28, 1955, he has been corresponding with various attorneys and with the court of last resort. This is not sufficient justification for the protracted delay here shown. For this reason appellant has failed to meet the procedural requirements of California, and in so doing he has failed to exhaust his state remedies and is for that reason prevented from presenting the questions which he now attempts to present to this Court (Fay v. Noia, 9 L.Ed.2d 837, 371 U.S. 391, 83 S.Ct. 822; Carter v. Illinois, 329 U.S. 173, 176, 67 S.Ct. 216, 91 L.Ed. 172, 175; Irvin v. Dowd, 359 U.S. 200, 3 L.Ed. 900, 907, 79 S.Ct. 825; Darr v. Burford, 339 U.S. 200, 210-214, 94 L.Ed. 761, 770-772, 70 S.Ct. 587).

III BY THE FAILURE TO SEASONABLY RAISE  
THE FEDERAL QUESTION, APPELLANT HAS  
WAIVED ANY RIGHT TO DO SO

It is now established that a defendant forfeits his constitutional right by the failure to make timely assertion of that right (Michel v. Louisiana, 350 U.S. 91, 99, 76 S.Ct. 158, 100 L.Ed. 83, 92; Edelman v. California, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387; Jennings v. Illinois, 342 U.S. 104, 72 S.Ct. 123, 96 L.Ed. 119; Brown v. Allen, 344 U.S. 443, 480, 73 S.Ct. 397, 97 L.Ed. 469, 501).

It is patent from the records in this case that the alleged action here involved was well known to the appellant



at the time of trial and appeal in 1954 and 1955. Neither he nor his counsel saw fit to petition the United States Supreme Court for certiorari from the affirmance of his judgment nor to take any other action to protect that right. Indeed, it would appear that the first time that the question of the violation of his federal rights was raised was when he filed his petition for habeas corpus with the California Supreme Court in December, 1961.

A defendant and his counsel cannot neglect known objections to the proceeding on federal constitutional grounds for later use in a collateral attack on the judgment (Brown v. Allen, 344 U.S. 443, 480, 73 S.Ct. 397, 97 L.Ed. 469, 501).

IV ARTICLE 6, SECTION  $4\frac{1}{2}$  OF THE CALIFORNIA CONSTITUTION IS NOT IN CONFLICT WITH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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Appellant has created the impression in his petition that in California a defendant is not entitled to a fair trial and the protection of the Fourteenth Amendment to the United States Constitution, if the evidence overwhelmingly establishes the defendant's guilt. Such is not, and never has been, the law in this State. The section of the California Constitution under consideration reads as follows:

"Art. VI, sec. 4  $\frac{1}{2}$ . No judgment shall be set aside, or new trial granted, in any case, on the



ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

This section, as first adopted in 1911, had reference only to criminal cases. It was amended in 1914 so as to also apply to civil cases. While it had long been provided in our statutory law that judgments would not be reversed because of technical errors or defects which did not affect the substantial rights of the defendant (Pen. Code §§ 1258, 1404), the courts nevertheless in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error and upon that basis the defendant was "entitled to a reversal of the judgment" (People v. Williams, 18 Cal. 187, 194; see also People v. Murphy, 47 Cal. 103, 106; People v. Stanley, 47 Cal. 113, 119 (17 Am. Rep. 401); People v. Furtado, 57 Cal. 345, 347; People v. Sansome, 84 Cal. 449, 451, 24 P. 143; People v. Moore, 103 Cal. 508, 511, 37 P. 510; People v. Richards, 136 Cal. 127, 128, 68 P. 477). The constitutional amendment added a new concept calling for a determination by the court that the alleged error resulted in "a miscarriage of justice."



To this end the appellate court was required to review the evidence so as to form an "opinion" as to whether the assigned errors had affected the outcome of the case resulting in a "miscarriage of justice."

The application of this provision of the California Constitution is best explained by the California Supreme Court's statement in People v. Sarazzawski, 27 Cal.2d 7, 11, 161 P.2d 934, where the court stated the principles which have guided all the courts of this State in the application of that constitutional provision:

"At least two of such incidents are matters of such grave moment as to amount to substantial departures from the established elements of a fair trial, to which every person charged with crime, no matter how rich or poor, virtuous or debased, is entitled. When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4 1/2 of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand. (People v. Mahoney, 201 Cal. 618, 627 [258 P. 607]; People v. Adams, 76 Cal.App. 178, 186-187 [244 P. 106]; People v. Gilliland, 39 Cal.App.2d 250, 264 [103 P.2d 179]; People v. Duvernay, 43 Cal.App.2d 823, 829 [111 P.2d 659].) That section was not designed to abrogate the guaranties accorded persons accused of



crime by other parts of the same constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.<sup>1</sup> (People v. O'Bryan, 165 Cal. 55, 65 [130 P. 1042], opinion of Mr. Justice Sloss; People v. Wilson, 23 Cal.App. 513, 524 [138 P. 971].)"

There has been a constant adherence to this interpretation (People v. Rogers, 56 Cal.2d 301, 307, 14 Cal.Rptr. 660, 363 P.2d 892; People v. Elliot, 54 Cal.2d 498, 506, 6 Cal.Rptr. 753, 354 P.2d 225; In re Winchester, 53 Cal.2d 528, 531, 2 Cal.Rptr. 296, 348 P.2d 904; People v. Dorman, 852, 28 Cal.2d 846, 172 P.2d 686; People v. Muza, 178 Cal.App.2d 901, 914, 3 Cal.Rptr. 395; People v. Hollins, 164 Cal.App.2d 191, 194, 330 P.2d 246; People v. Tucker, 164 Cal.App.2d 624, 628, 331 P.2d 160; People v. Arends, 155 Cal.App.2d 496, 510, 318 P.2d 532; People v. Musumeci, 133 Cal.App.2d 354, 365, 284 P.2d 168; People v. Robarge, 111 Cal.App.2d 87, 95, 244 P.2d 407).



As this Court pointed out in Chavez v. Dickson, 280 F.2d 727, 731, it is not the function of a federal court to review the correctness of a state court's interpretation of state law.

In People v. Cowan, 44 Cal.App.2d 155, 159, the court was called upon to determine whether or not Article 6 section 4 1/2 of the California Constitution violated the provisions of the Fourteenth Amendment to the Federal Constitution. The court pointed out that this section of our Constitution had never been construed in such a manner as to conflict with the Fourteenth Amendment.

A like conclusion was reached by the United States Court of Appeals for the Ninth Circuit in Sampsell v. People of State of California, 191 F.2d 721, 726.

In effect Article 6, section 4 1/2 of the California Constitution is, in operation, identical to Rule 52 of the Federal Rules of Criminal Procedure and section 2111 of Title 28, U.S.C.A., Judiciary and Judicial Procedure.

In all instances it is provided that a judgment will not be reversed for a mere technicality, for it is recognized that in a long and protracted trial perfection is impossible and some error will naturally creep into the record. These sections and rules provide that such errors shall not be deemed prejudicial and automatically result in a reversal. But, if such error is of such a magnitude



as to constitute a denial of due process, the saving grace of these provisions is inoperative for it is presumed that there has been a miscarriage of justice which requires a reversal.

V      APPELLANT WAS NOT DENIED A FAIR AND IMPARTIAL TRIAL

On his appeal the appellant called to the attention of the California Supreme Court conduct on the part of the trial court which he considered prejudicial. That conduct was fully considered by the court and in certain instances found to constitute misconduct, but there was no finding that the trial court's conduct deprived the appellant of due process of law.

Habeas corpus will not lie in a federal court to review errors committed during a trial in a state court unless they involve jurisdiction of the court or constitute a deprivation of constitutional rights amounting to a denial of the essence of a fair trial (Smith v. United States, 187 F.2d 192, 197; Schechter v. Waters, 199 F.2d 318, 319; Sunal v. Large, 332 U.S. 174, 179, 91 L.Ed. 1982, 1987; Buchalter v. New York, 319 U.S. 427, 429; Application of Lyda, 154 F.2d 237, 238; Leonard v. Hudspeth, 112 F.2d 121).

A full review of the record establishes that there was no deprivation of appellant's constitutional rights. Indeed, a review of the transcript of that trial



will reveal that the conduct of the appellant was, to say the least, shocking. He constantly demonstrated complete contempt for the court and for any orderly process of law. On several occasions he became so obnoxious that it became necessary to cite him for contempt (RT 2143:16 to 2147:11). His insolent conduct and vulgarity during his cross-examination is unbelievable (RT 1064:11 to 1217:18; RT 2138:19 to 2143:14).

VI      THE DISTRICT COURT PROPERLY  
REFUSED TO GRANT A HEARING

The United States Supreme Court in Townsend v. Sain, 83 S.Ct. 745, held that a hearing was not required if the applicant had received a full and fair evidentiary hearing in the state court either at the time of trial or in a collateral proceeding. As the appellant's points relate solely to the conduct of the trial judge and the district attorney during his trial, which questions were considered by the California Supreme Court on appeal, it is patent that he has received a full and complete hearing on the factual questions in the state court.

Further, it is apparent from the opinion of the District Court that he reviewed the state records of that trial, which were lodged with him, in accordance with the mandate of this court in Chavez v. Dickson, 280 F.2d 727, 733.



## CONCLUSION

Appellee respectfully submits that the record in this matter supports the finding of the District Court and discloses that appellant was accorded due process of law in the state courts.

It is therefore submitted that the District Judge neither erred in denying said petition nor in denying appellant counsel.

It is therefore submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS  
IN AND FOR THE NINTH CIRCUIT

HAROLD JACKSON,  
Appellant,  
vs.  
THE PEOPLE OF THE STATE OF  
CALIFORNIA,  
Appellee

No. 19052

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CERTIFICATE OF ATTORNEY FOR APPELLEE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DORIS H. MAIER  
Assistant Attorney General







*See Vol.  
3303*

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BILLY JOE WRIGHT,

Appellant,

vs.

FRED R. DICKSON, Warden,  
California State Penitentiary,

Appellee.

LIBRARY, CALIF. ATTY. GEN. SAN FRANCISCO

No. 19234

FEB 26 1969

FDN 10 1964

APPELLEE'S PETITION FOR REHEARING

THOMAS C. LYNCH, Attorney General  
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## SUBJECT INDEX

	<u>Page</u>
Argument	
I. That the issues determined in this case have never been adequately briefed and argued before this Court.	2
II. That any denial of right to counsel at the preliminary examination had no relationship to the constitutional validity of the conviction in the superior court.	2
III. That the superior court proceedings are the only pertinent proceedings, and those proceedings reflect an intelligent and voluntary waiver of counsel.	4
Conclusion	5



TABLE OF CASES

	<u>Page</u>
<u>Escobedo v. Illinois,</u> <u>377 U.S.</u> ____ ( <u>1964</u> )	3
<u>Hamilton v. Alabama,</u> <u>368 U.S.</u> 52 ( <u>1951</u> )	3
<u>Herman v. Claudy,</u> <u>350 U.S.</u> 116 ( <u>1956</u> )	5
<u>Moore v. Michigan,</u> <u>355 U.S.</u> 155 ( <u>1957</u> )	5
<u>Odell v. Burke,</u> <u>281 F.2d</u> 782 ( <u>7th Cir.</u> 1960), <u>cert. denied</u> 364 U.S. 875 ( <u>1960</u> )	3
<u>People v. Diaz,</u> <u>206 Cal.App.2d</u> 651 ( <u>1962</u> )	3
<u>People v. Mora,</u> <u>120 Cal.App.2d</u> 896 ( <u>1953</u> )	3
<u>People v. Williams,</u> <u>124 Cal.App.2d</u> 32 ( <u>1954</u> )	2, 3
<u>Rice v. Olsen,</u> <u>324 U.S.</u> 786 ( <u>1945</u> )	5
<u>Sanders v. United States,</u> <u>373 U.S.</u> 1 ( <u>1963</u> )	5
<u>White v. Maryland,</u> <u>373 U.S.</u> 59 ( <u>1963</u> )	3

STATUTES

<u>California Constitution,</u> article I, § 8	3
<u>19 Ops.Cal.Atty.Gen.</u> 104 ( <u>1952</u> )	2
<u>California Penal Code,</u> § 859 § 987	2 4



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BILLY JOE WRIGHT,

Appellant,

vs.

FRED R. DICKSON, Warden,  
California State Penitentiary,

Appellee.

}

No. 19234

PETITION FOR REHEARING

To the Honorable FREDERICK G. HAMLEY, OLIVER D. HAMLIN, and  
JAMES R. BROWNING, Circuit Judges, of the United States Court  
of Appeals for the Ninth Circuit:

Appellee, Lawrence E. Wilson, successor to Fred R.  
Dickson, Warden of the California State Prison at San Quentin,  
California, hereby petitions for a rehearing to reconsider  
the judgment entered in this action on September 11, 1964, on  
the following grounds:

I. That the issues determined in this case have  
never been adequately briefed and argued before this Court.

II. That any denial of right to counsel at the  
preliminary examination had no relationship to the constitu-  
tional validity of the conviction in the superior court.

III. That the superior court proceedings are the only  
pertinent proceedings, and those proceedings reflect an  
intelligent and voluntary waiver of counsel.



I

Since the appeal was not properly pending before this Court in the absence of a certificate of probable cause for appeal, since counsel was not appointed who could present the issues in an intelligible and serious manner, and since there was thus no oral argument of the case, respondent was not confronted with the issues raised by the opinion and the Attorney General of California had no meaningful opportunity to meet, by brief and argument, what the Court has found to be defects of a constitutional proportion in the proceedings against appellant. Since respondent believes that the opinion of the Court is based on a fundamental misconception of California criminal practice, it is imperative that the Court grant a rehearing to permit thorough briefing and argument of the fundamental issues raised by this decision.

II

At the time of the criminal proceedings against appellant, any criminal defendant in California was entitled to be represented by counsel at the preliminary examination, and if he was unable to employ counsel, the court had to assign counsel to defend him. Cal. Pen. Code § 859; 19 Cal. Ops. Atty. Gen. 104 (1952); People v. Williams, 124 Cal. App. 2d 32 (1954).

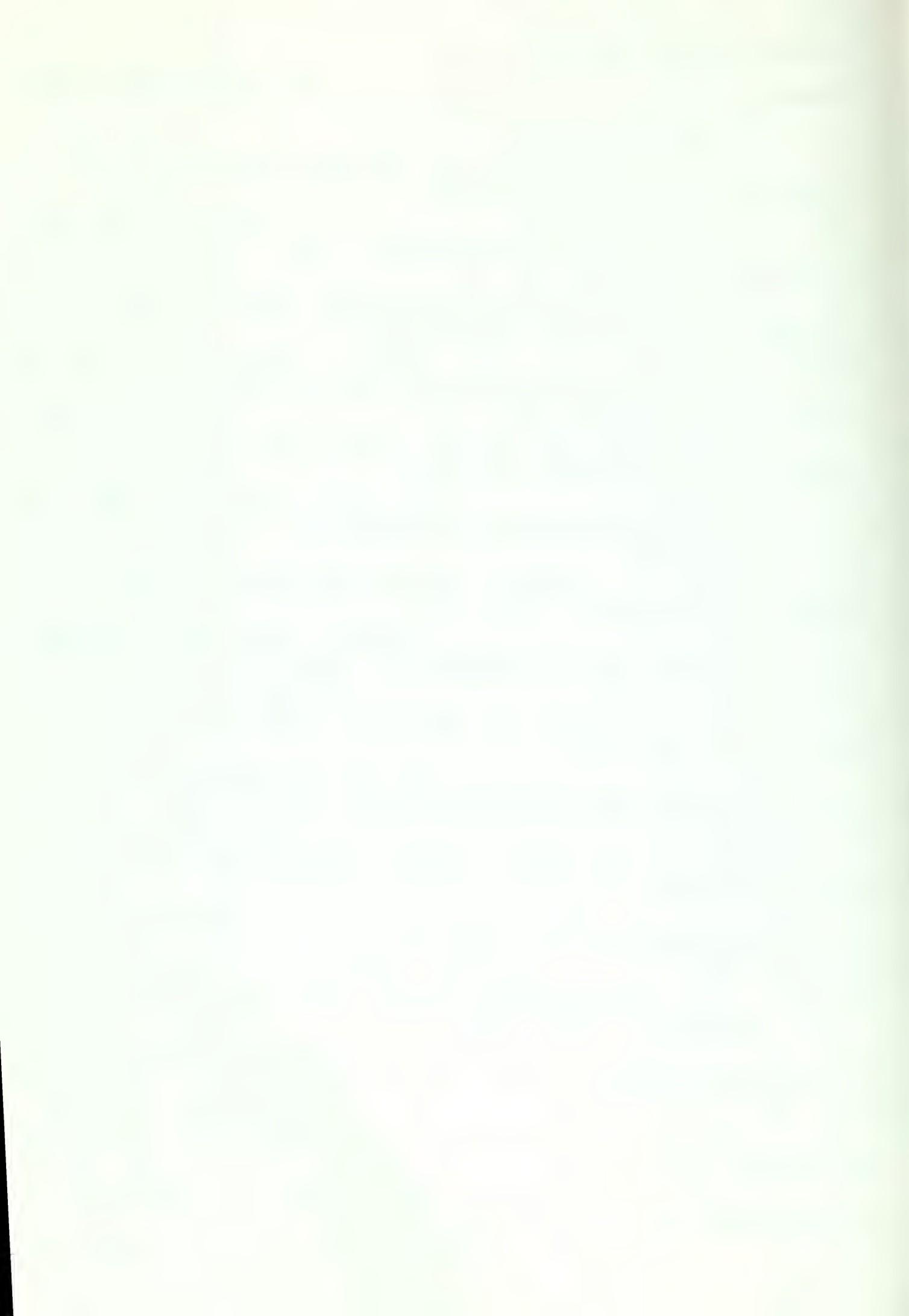
Even assuming that appellant was denied his right to counsel at the preliminary examination, those proceedings were not a "critical stage" in the proceedings against him



which must as a matter of law vitiate the conviction in the superior court.

Under California law appellant could have set aside the information and voided the proceedings at preliminary examination if he was, as he claims, denied his right to counsel. People v. Williams, supra; People v. Diaz, 206 Cal.App.2d 651 (1962). Unlike White v. Maryland, 373 U.S. 59 (1963), appellant could not have pleaded guilty at the time of preliminary examination, Cal. Const. art. I, § 8, nor could any incriminating statement taken from him at that time when he was not represented by counsel have been used in evidence against him. People v. Mora, 120 Cal.App.2d 896 (1953), disapproved on another point by People v. Van Eyk, 56 Cal.2d 471, 477 (1961). Unlike Hamilton v. Alabama, 368 U.S. 52 (1951), under California law appellant could not have waived any defense, procedural or substantive, by anything that occurred at the time of the preliminary examination. Because of the nature of California criminal proceedings, it is clear that there is no federally-protected right to counsel at preliminary examination. See Odell v. Burke, 281 F.2d 782 (7th Cir. 1960), cert. denied 364 U.S. 875 (1960).

Moreover, since California law insured to the criminal accused the right to counsel at preliminary examination, and since no statements were used in this case at any time in the superior court proceedings against the appellant, the reference to Escobedo v. Illinois, 377 U.S. \_\_\_\_ (1964),



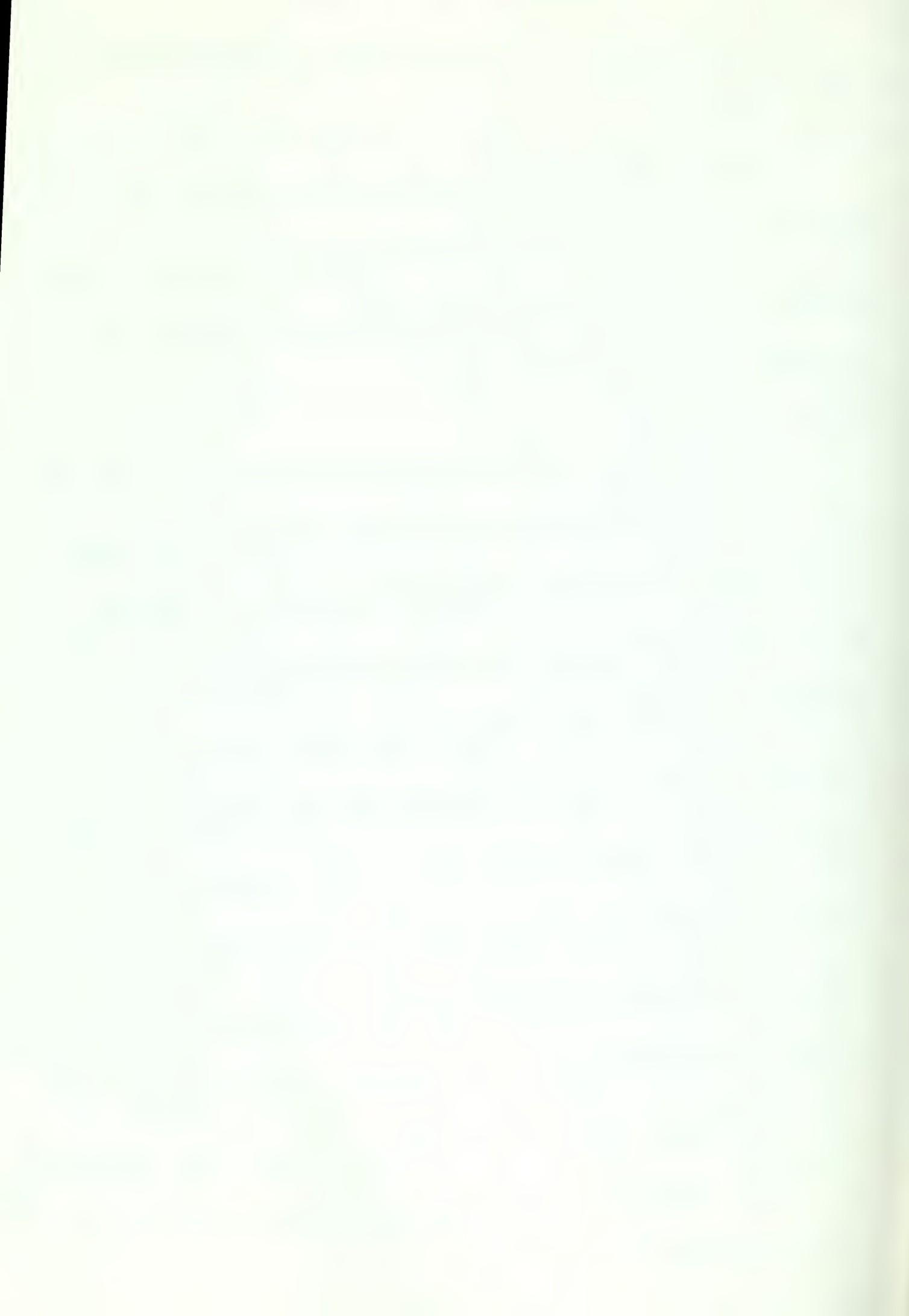
in the opinion of this Court was entirely unnecessary and without relevance.

Since appellant with an attorney could have set aside the proceedings at the preliminary examination and since he cannot claim any advantage from having refused the services of an attorney, the only significant question before the Court is whether he did competently waive counsel in the superior court.

### III

Since 1872, California has required that a defendant in the superior court on appearing for arraignment without counsel must be informed of his right to counsel and asked if he desires the aid of counsel. "If he desires and is unable to employ counsel, the court must assign counsel to defend him." Cal. Pen. Code § 987. The record in the superior court (June 16, 1954) shows that the court did inform appellant of his right to counsel and that he waived the right. Moreover, the transcript of the arraignment for sentencing on June 28 relates that when appellant was informed of his right to counsel he informed the court that he did not want an attorney and wished to proceed without one. No dissent or disclaimer by appellant to this statement is reflected in the transcript. The opinion of this Court states that the appellant does not challenge these factual recitals.

Essentially, the opinion of this Court sets aside the undisputed record showing a waiver of counsel on the basis



of appellant's claim that "because of illiteracy, youth, and inexperience he had no understanding of his rights or of the meaning and consequences of a waiver of counsel." None of the cases cited by the Court or known to us require a hearing in the United States District Court where the record shows a waiver of counsel, simply on a claim of illiteracy, youth, inexperience, and lack of understanding. These cases relied upon by this Court involved either petitioner's uncontradicted denial of a waiver, Rice v. Olsen, 324 U.S. 786 (1945); positive evidence of record supporting petitioner's claim that any waiver was coerced, Moore v. Michigan, 355 U.S. 155 (1957); Herman v. Claudy, 350 U.S. 116 (1956); or factual allegations which by their very nature were not reflected in the record, Sanders v. United States, 373 U.S. 1 (1963). The petition here raises none of these grounds.

#### CONCLUSION

It is respectfully submitted that the petition for rehearing be granted.

Dated: October 9, 1964

Respectfully submitted,

THOMAS C. LYNCH, Attorney General  
of the State of California  
ALBERT W. HARRIS, JR.

Deputy Attorney General

  
MICHAEL R. MARRON  
Deputy Attorney General

Attorneys for Appellee.

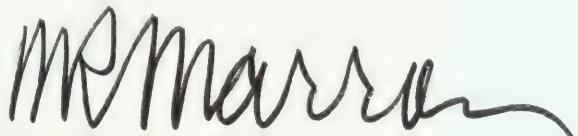


CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellee and respondent in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated: San Francisco, California

October 9, 1964



MICHAEL R. MARRON, Deputy Attorney  
General of the State of California

Of Counsel for Appellee and  
Respondent.



No. 20,241

IN THE

FEB 26 1969

# United States Court of Appeals

FOR THE NINTH CIRCUIT

*See Vols.*  
3360  
3377  
3404  
3490

EL RANCO, INC., a Nevada corporation, EL RANCO  
HOTEL OPERATING COMPANY, a Nevada corporation,  
BELDON R. KATLEMAN, JCA Artists, Ltd., a Dela-  
ware corporation, ROY GERBER and MATT GREGORY,

*Appellants,*

*vs.*

THE FIRST NATIONAL BANK OF NEVADA, as Adminis-  
trator of the Estate of Rene Bardy, deceased,

*Appellee.*

## PETITION FOR REHEARING.

FILED

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## TOPICAL INDEX

	Page
I.	
The Court Has Misapprehended the Facts and Law With Respect to the Assignments to Bardy .....	1
II.	
The Court Has Overlooked the Facts With Respect to the Nevada Fictitious Name Statute .....	4
III.	
The Court Has Overlooked the Impact on the Jury of the Trial Judge's Attitude .....	5

---

## TABLE OF AUTHORITIES CITED

### Cases

Las Vegas Network, Inc. v. Shawcross, 80 Nev. 405, 395 P. 2d 520 .....	2, 3
Thelin v. Intermountain Lumber, 80 Nev. 285, 392 P. 2d 626 .....	2, 3



No. 20,241

IN THE

# United States Court of Appeals FOR THE NINTH CIRCUIT

---

EL RANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING COMPANY, a Nevada corporation, BELDON R. KATLEMAN, JCA Artists, Ltd., a Delaware corporation, ROY GERBER and MATT GREGORY,

*Appellants,*

*vs.*

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of Rene Bardy, deceased,

*Appellee.*

---

## PETITION FOR REHEARING.

---

*To the Honorable Oliver D. Hamlin, Jr., Circuit Judge,  
M. Oliver Koelsch, Circuit Judge, and James R.  
Browning Circuit Judge:*

Appellants herein, El Ranco, Inc., a Nevada corporation, El Ranco Hotel Operating Company, a Nevada corporation, and Beldon R. Katleman, hereby petition for a rehearing to reconsider the judgment entered in this action on October 30, 1968, on the following grounds:

### I.

#### The Court Has Misapprehended the Facts and Law With Respect to the Assignments to Bardy.

In its opinion the Court recognized that under Nevada law an assignment of a claim to plaintiff does

not relate back to the commencement of the action and under such an assignment the plaintiff is not the real party in interest (p. 4). This Court distinguished the applicable Nevada decisions (*Thelin v. Intermountain Lumber*, 80 Nev. 285, 392 P. 2d 626 [1964]; *Las Vegas Network, Inc. v. Shawcross*, 80 Nev. 405, 395 P. 2d 520 [1964]) on the basis that Bardy possessed an interest at the time the action was commenced and the jury in effect so found by rendering a verdict for Bardy on his contract claim.

Appellants submit that such distinction is not supported by the facts.

Aside from the merits issue, the most strongly litigated issue was whether Bardy was the real party in interest. Aware of this problem, Bardy obtained the assignments after the action was commenced. By their admission into evidence, over objection, the issue of real party in interest was to all intents and purposes removed from the case. If the jury believed Bardy was the proper party in interest it could award him a verdict. If it felt he was not, it could nevertheless award him a verdict because of the assignments.

This court, in effect, has held that the assignments were improperly admitted because they postdated the commencement of the action but that such admission was not prejudicial because Bardy "possessed an interest at the critical date" (p. 5). Whether or not he did was for the jury to decide. To hold that it so decided begs the question, because once the assignments were admitted into evidence, the jury had to find that if a verdict was to be returned on the contract or conspiracy claim, or both, it had to be in Bardy's favor. Under such circumstances how can it be determined

whether the award to Bardy on the contract claim or the conspiracy claim was based on the jury believing Bardy possessed an interest at the time of filing or as a result of the assignments? The jury had the assignments before them [T. 3226, line 13, to T. 3227, line 22].\*

And even if the jury, by ruling for Bardy on the contract claim, necessarily found that he could agree to present the show and use its name and receive moneys for doing so, how about the items for which the conspiracy damages were awarded, including the use of "performers in a show in his Paris nightclub from July 29th, 1959 to October 21, 1959" (p. 16). On this score it is undisputed that the nightclub was owned by Mansart and was operated at all times by a société and Bardy received income only in the form of author's royalties through dummies [T. 1434, lines 7-15; T. 1439, line 24, to T. 1440, line 13].

Thus, the real party in interest issue became a "heads I win, tails you lose" proposition.

This court has said that appellants were not prejudiced by the admission of the assignments (p. 5). Surely, the effective removal of the real party in interest issue was prejudice of the higher order.

Appellants submit that this court's statement that appellants could not have been prejudiced because "no proof whatever was offered or admitted of any injuries suffered by the assignors with respect to the subject matter of the assignments during the period following the filing of the complaint" (p. 5) misapprehends the holdings in *Thelin* and *Shawcross*.

---

\*On pages 55 and 56 of the Brief of these appellants numerous possibilities as to jury thinking are set forth.

Those decisions lay down the flat substantive rule of law that a plaintiff must own the claim at the time he commences his action. They do not provide that a defendant must prove that the assignor suffered injury or damage after the filing of the complaint. Indeed, the writer respectfully submits that it is difficult to imagine how an assignor can be damaged after he has assigned away his rights. As shown above the appellants were vitally prejudiced by the admission into evidence of the assignments.

## II.

### **The Court Has Overlooked the Facts With Respect to the Nevada Fictitious Name Statute.**

In holding the Nevada fictitious name statute inapplicable, this court said that

“it was not disputed that Bardy entered Nevada for the sole purpose of presenting his review at the El Rancho Hotel and with the definite intention to leave at the end of the engagement, that his business dealings were limited to matters incidental to such presentation and that his actual stay was not of long duration” (p. 6).

It may well have been Bardy’s intention at the time of entry into Nevada to return to Paris at the end of the engagement, but that intention was not maintained. A new contract extending the engagement for 8 weeks was entered into [Ex. 472]. Gerber attempted to sell the show to the Mapes Hotel in Reno, Nevada, to appear after it left the El Rancho [T. 2573, line 16, to T. 2574, line 21] and Lou Walters, at the request of Bardy, attempted to sell the show to other Las Vegas hotels [T. 949, line 12, to T. 951, line 19]. Of even greater

significance is the fact that Bardy's compensatory damage claim was based primarily on the theory (approved by this court) that the "show could have been booked in Las Vegas on a continuous basis with longer and better engagements . . ." (pp. 18, 19). Surely, the foregoing indicated much more than a single or isolated transaction.

This court, after setting forth the quoted language in the first paragraph of this point, concluded, "[O]n these facts we cannot say that the statute would apply" (p. 6). Even if this court, after considering the facts set forth above, could nevertheless similarly conclude, the question should really be whether the court can say that as *a matter of law* the statute does not apply. Manifestly a fact question on the issue was presented. The jury should have decided the question under appropriate instructions. It should not have been taken away from it.

### III.

#### **The Court Has Overlooked the Impact on the Jury of the Trial Judge's Attitude.**

In its opinion this court appears to recognize that the Trial Judge moved the case along at a fast pace. The Judge's attitude was directed almost entirely at appellants, curtailing examinations and cross-examinations by their counsel and requiring them to stipulate to many facts. As shown by Appendices A and B of the Brief of these appellants much of the limitations imposed were accompanied by remarks to the effect that Bardy was not discredited.

What was the impact of such attitude on the jury? The jury was in an enormous hurry to get the case

finished. When the Judge wanted to recess the trial prior to instructing the jury, the jury requested that it be instructed at night [T. 3047, line 22, to T. 3050, line 12; T. 3050, line 18, to T. 3060, line 5]. Based on the attitude and remarks of the Trial Judge the jurors could well have believed that the Judge felt Bardy should get a verdict and appellants' counsel was wasting time. How else can we rationalize the large punitive damage award?

Wherefore, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

SAMUEL S. LIONEL and  
LEO K. GOLD,  
*Attorneys for Appellants.*

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: November 12, 1968.

LEO K. GOLD,  
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Beverly Hills, Calif. 90212.



No. 20,585

/ FEB 26 1969

IN THE

United States Court of Appeals  
For the Ninth Circuit

ANITA T. OWENS,

vs.

RAYMOND L. WHITE, JOHN C. McCARTER,  
ALFRED POPMA, and ST. LUKE'S HOSPITAL,  
a corporation,

*Appellant,*

*Appellees.*

Appeal from Summary Judgment of Dismissal  
of the United States District Court  
for the District of Idaho,  
Southern District

Honorable Ray McNichols, Judge

APPELLANT'S PETITION FOR A REHEARING

FILED

JUL 27 1967

WM. B. LUCK, CLERK

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FILED

~~MAY 31 1967~~

WM. B. LUCK, CLERK

AUG 2 1967



## **Subject Index**

---

	Page
Statement of the case .....	2
Grounds for rehearing .....	3
Conclusion .....	4

---

## **Table of Authorities Cited**

---

### **Statutes**

	Page
Idaho Code, Section 5-219 .....	2
28 U.S.C.A.:	
Section 1291 .....	2
Section 1332 .....	2

### **Rules**

Rules of Court, Rule 23 .....	1
-------------------------------	---



No. 20,585

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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ANITA T. OWENS,

vs.

RAYMOND L. WHITE, JOHN C. McCARTER,  
ALFRED POPMA, and ST. LUKE'S HOSPITAL,  
a corporation,

*Appellant,*

*Appellees.*

Appeal from Summary Judgment of Dismissal  
of the United States District Court  
for the District of Idaho,  
Southern District

Honorable Ray McNichols, Judge

**APPELLANT'S PETITION FOR A REHEARING**

---

*To the Honorable Chief Judge, and to the Honorable  
Associate Judges of the United States Court of  
Appeals for the Ninth Circuit:*

Appellant herein, in accordance with Rule 23 of the Rules of Court of the United States Court of Appeals for the Ninth Circuit, respectfully petitions this Honorable Court that it grant a rehearing en banc, setting aside that certain judgment and opinion

issued by the aforesaid Court on the 30th day of June, 1967.

---

#### **STATEMENT OF THE CASE**

This is a medical malpractice action and is before this Court on the basis of diversity of citizenship, the original jurisdiction of the District Court existing under 28 U.S.C.A. §1332. The amount in controversy exceeds the sum of ten thousand dollars (\$10,000.00), exclusive of interest and costs. This Honorable Court has jurisdiction pursuant to the provisions of 28 U.S.C.A. §1291.

The action was commenced on October 11, 1963. Motions to Dismiss, premised upon the affirmative defense of the statute of limitations, as set forth in §5-219, Idaho Code, were filed on the 26th day of November, 1963 and the 3rd day of December, 1963. On December 20, 1963, the District Court granted the Motion to Dismiss without leave to amend. Thereafter, on the 12th day of March, 1965, this Honorable Court reversed the judgment and remanded the cause for further proceedings.

On June 2, 1965, the District Court held an evidentiary hearing to determine whether the "discovery rule" should be applied to determine when appellant's cause of action accrued. Thereafter, and on the 22nd day of June, 1965, the District Court filed its memorandum decision, including Findings of Fact and Conclusions of Law, determining that the "discovery rule" ought not to be applied in this case. Findings, conclusions and a joint Order were thereafter filed

on July 19, 1965. On August 23, 1965, Appellees' Motion for Summary Judgment came on for oral argument. Summary Judgment was granted and, on the 22nd day of September, 1965, the District Court entered its Judgment of Dismissal with prejudice.

Appellant having duly filed her Notice of Appeal, Statement of Points on Appeal and Designation of Contents of Record on Appeal, briefs were thereafter submitted by Appellant and the Appellees. Oral argument was heard before Circuit Judges Hamlin, Koelsch and Ely. On June 30, 1967, Judge Hamlin dissenting, this Honorable Court filed its opinion, affirming the Judgment of Dismissal entered below.

---

#### **GROUNDS FOR REHEARING**

Appellant respectfully petitions for a rehearing en banc on the following grounds:

(1) The District Court was clearly wrong in its determination that Idaho would not apply the "discovery rule" in this case.

(2) The District Court erred in granting Summary Judgment despite the existence of triable issues of fact.

(3) The District Court and this Honorable Court erred in mistakenly determining that the issue of statute of limitations is, under Idaho law, an issue of law for the court; on the contrary, the special defense of the statute of limitations raises issues of fact, which, in accordance with Idaho law, must be tried to the jury.

**CONCLUSION**

Wherefore, Appellant and Petitioner herein very respectfully petitions this Honorable Court that it grant a rehearing en banc in this case.

Dated, San Francisco, California,  
July 26, 1967.

MELVIN M. BELL,  
*Attorney for Appellant  
and Petitioner.*

---

**CERTIFICATE OF COUNSEL**

I hereby certify that I am of counsel for Appellant and Petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,  
July 27, 1967.

MELVIN M. BELL,  
*Of Counsel for Appellant  
and Petitioner.*

No. 20,770

IN THE

United States Court of Appeals  
For the Ninth Circuit

UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,

*Appellants,*

vs.

GENERAL ELECTRIC COMPANY,  
a New York corporation, et al.,

*Appellees.*

Appeal from the United States District Court  
for the Northern District of California

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*Of Counsel.*

FILED

JUN 28 1968

WM. B. LUCK, CLERK



## Subject Index

	Page
I. The evidence offered by appellants was sufficient for their case to go to the jury .....	2
1. The suppliers of twelve leading brands of major appliances and/or television sets refused to deal with Manfree .....	2
2. Some suppliers did sell to Manfree for periods of time, but subsequently they all refused to continue to deal with Manfree .....	3
3. Statements by representatives of suppliers at times of refusals to deal with Manfree .....	3
4. Evidence of conspiracy from common refusals to deal .....	10
5. Appellants' letters to vendors requesting product .....	12
6. Alleged reasons for refusals to deal .....	13
7. Manufacturers' list prices as retail prices .....	19
8. Knowledge of vendor defendants that local defendant retailers controlled the advertising of the subject products in the local market .....	25
9. Morning newspaper boycott .....	26
10. Boycott of GET, another discount store in San Francisco County .....	28
11. Sales by defendant vendors to discount stores located outside of San Francisco .....	29
12. Special terms in the purchasing and advertising of the subject products, favoring the co-conspirator retailers .....	29
13. Direct co-conspirator retailer action to foreclose appellants' newspaper advertising .....	31
Conclusion .....	32
II. The special defenses of the appellees are unmeritorious	32
A. A notice of appeal is to be liberally construed to effectuate the intent of the parties, when no prejudice is shown .....	32
1. The court has jurisdiction over Norge Sales Corporation .....	32

## SUBJECT INDEX

B.	Maytag West Coast is in error in urging that appellants may not show its knowledge of the conspiracy and reasons for joining it even though they occurred prior to the time of the refusal to deal .....	33
III.	The trial court erred in the exclusion of evidence .....	34
A.	Mr. Valenson's admissions to Mr. Freeman were admissions against interest, and admissible against California Electric .....	34
B.	Borg-Warner Exhibit 9024 was placed in evidence by that defendant and it should not have been stricken .....	35
C.	The court prejudicially excluded documents pertaining to N.E.M.A. and A.H.L.M.A. exhibits (See B.W. Br., pp. 57-68) .....	36
D.	Pl. Ex. for Id. No. 4028 established the contrary to Borg-Warner's contention that the boycott of U.S.E. was not discussed at the Villa Hotel meeting .....	38
E.	G.E.'s own documents show that retailers in San Francisco did not engage in retail price competition .....	38
F.	The exclusions of the testimony of Vern Brown and Pl. Exs. for Id. Nos. 5112 and 5113 were an abuse of pre-trial rules .....	39
G.	The trial court erred in excluding evidence offered against R.C.A. ....	40
H.	The trial court erred in excluding evidence against Whirlpool .....	47
I.	Evidence that Frigidaire maintained suggested list prices after 1960 was improperly rejected .....	48
J.	The deposition of Arthur Alpine was erroneously excluded .....	48
IV.	The trial court erred in its pretrial discovery rulings..	49
A.	The trial court erred in not enforcing the subpoena duces tecum against Frigidaire Sales Corporation .....	49

## SUBJECT INDEX

iii

B.	The court erred in denying the plaintiff's motion for an order to show cause why documents should not be produced by defendant R.C.A. ....	50
C.	The court erred in denying production of documents addressed to the factory defendants, Item 15	50
D.	The court erred in denying Item 15 of plaintiff's motion for the production of documents addressed to the distributor defendants .....	51
E.	The court erred in refusing to require appellees General Electric, Whirlpool, and RCA to answer Questions 2, 3, 4, 5 and 6 of plaintiff's interrogatories, and in refusing to require said appellees to answer Questions 1, 2, 3 and 6 of plaintiff's second interrogatories .....	51
F.	The court denied production of documents described under Items 20, 22(c)-(e), and 27(f) of plaintiff's motion for the production of documents	52
V.	The trial court permitted prejudicial error in not permitting appellants to introduce evidence or obtain judgment based on defendant's entry into vertical conspiracies to restrain and monopolize interstate trade and commerce, as alleged in the complaint .....	53
VI.	Items of costs improperly taxed .....	54
	Conclusion .....	58

## Table of Authorities Cited

---

Cases	Pages
Albrecht v. The Herald Co., 19 L. Ed. 2d 998 (1968) . . . . .	21, 43
American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944) . . . . .	37
Bergholdt v. Porter Bros. Co., 114 Cal. 681 (1896) . . . . .	6
Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961) . . . . .	32
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) . . . . .	370 2, 33, 43
Dextone Co. v. Building Trades Council, 60 F. 2d 47 (2d Cir. 1932) . . . . .	33
Eesco Corporation v. United States, 340 F. 2d 1000 (9th Cir. 1965) . . . . .	4, 21, 33, 36, 37, 38
Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964) . . . . .	54, 55, 56, 57
Federal Trade Commission v. Fred Meyer, Inc., 88 S. Ct. 904 (1968) . . . . .	31, 43
Fifth and Walnut, Inc. v. Loew's, 1948 Trade Cases, Para. 62,458 (per J. Riffkind) . . . . .	49
Flintkote Company v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957) . . . . .	4, 33, 34, 35
Foman v. Davis, 371 U.S. 178 (1962) . . . . .	32
Gajewski v. Stevens, 346 F. 2d 1000 (8th Cir. 1965) . . . . .	32
Ginsburg v. Ginsburg, 276 F. 2d 94 (9th Cir. 1960) . . . . .	32, 33
Girardi v. Gates Rubber Company Sales Division, Inc., 325 F. 2d 196 (9th Cir. 1963) . . . . .	7, 15, 27, 45
Globe Indemnity Co. v. Capital Ins. & Sur. Co., 352 F. 2d 236 (9th Cir. 1965) . . . . .	39
Holz v. Smullan, 277 F. 2d 58 (7th Cir. 1960) . . . . .	32
Hughes v. Pacific Wharf etc. Co., 188 Cal. 210 (1922) . . . . .	40

## TABLE OF AUTHORITIES CITED

v

	Pages
Independent Iron Works, Inc. v. United States Steel Corp., 322 F. 2d 656 (9th Cir. 1963) .....	55, 56
Kemart Corp. v. Printing Arts Research Laboratories, Inc., 232 F. 2d 897 (9th Cir. 1956) .....	57
Klor's, Inc. v. Broadway Hale's Stores, Inc., 359 U.S. 207 (1959) .....	13
Moylan v. AMF Overseas Corporation, 354 F. 2d 825 (9th Cir. 1965) .....	57
Perlman v. Feldman, 116 F. Supp. 102 (D. Conn. 1953) ...	55
Perma Life Mufflers, Inc., et al. v. International Parts Corp., ATRR, No. 361, X-15 .....	54
Poe v. Gladden, 287 F. 2d 249 (9th Cir. 1961) .....	32
Simpson Timber Co. v. Palmberg Const. Co., 377 F. 2d 380 (9th Cir. 1967) .....	39
Standard Oil Co. of California v. Moore, 251 F. 2d 188 (9th Cir. 1957) .....	13, 15, 27, 33, 37
Thayer v. Pacific Elec. Ry. Co., 55 Cal. 2d 430 (1961) ....	6
Theatre Enterprises v. Paramount Film D. Corp., 346 U.S. 537 (1953) .....	11
United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967) .....	13, 43, 45
United States v. E. I. DuPont de Nemours & Co., 107 F. Supp. 324 (D. Del. 1952) .....	35
United States v. General Motors Corp., 384 U.S. 127 (1966)	9
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) .....	43
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) .....	21
Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) .....	31

## TABLE OF AUTHORITIES CITED

	Pages
Wagner Tractor, Inc. v. Shields, 381 F. 2d 441 (9th Cir. 1967) .....	40
Washington State Bowling Prop. Ass'n v. Pacific Lanes, 356 F. 2d 371 (9th Cir. 1966) .....	39
 <b>Codes</b> 	
Code of Civil Procedure:	
Section 1963(24) .....	40
Evidence Code:	
Section 641 .....	40
 <b>Rules</b> 	
Federal Rules of Civil Procedure:	
Rule 8(f) .....	54
 <b>Statutes</b> 	
28 U.S.C. Section 2111 .....	33
 <b>Texts</b> 	
2 Moore's Federal Practice, Section 34.01 .....	49
Restatement, Agency (2d), Section 14 N (1958) .....	6
1 Wigmore on Evidence, Section 95 (1st Ed.) .....	40

No. 20,770

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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UNITED SHOPPERS EXCLUSIVE, a California corporation; MANFREE, INC., a California corporation,  
*Appellants,*

vs.

GENERAL ELECTRIC COMPANY,  
a New York corporation, et al.,  
*Appellees.*

**Appeal from the United States District Court  
for the Northern District of California**

**REPLY BRIEF OF APPELLANTS**

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The various opening briefs of the appellees<sup>1</sup> each totally ignore the controlling rule in nonsuit cases: all inferences from the evidence are to be construed in favor of the party against whom the motion for

<sup>1</sup>Appellants will hereinafter refer to the separate opening briefs of the appellees as follows: General Electric Company (G.E. Br.); Borg-Warner Corporation and Norge Sales Corporation (B.W. Br.); California Electric Supply Company (Cal. El. Br.); Radio Corporation of America (R.C.A. Br.); Whirlpool Corporation (W.P. Br.); Maytag Company and Maytag West Coast Company (M.T. Br.); General Motors Corporation and Frigidaire Sales Corporation (Frig. Br.).

a directed verdict is made. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 696 (1962). Instead, in their arguments, the appellees arrogate to themselves the function of the trier of fact. From such an improper position, they recite as "fact" to this Court matters which the evidence, or reasonable inferences to be drawn from the evidence, disclose to be untrue.

Interestingly and significantly, the appellees either ignore (or attempt to dismiss lightly) the evidence summarized at pages 89 to 94 of Appellants' Opening Brief (App. O.B.). This fundamental evidence, demonstrating why appellants' case should have been permitted to go to the jury, is analyzed below, noting the reasonable inferences the trier of fact could draw from it. In contrast, it is also pointed out how the appellees either ignore this proof of antitrust violations, or state conclusions they have drawn which are contradicted by appellants' evidence.

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I. THE EVIDENCE OFFERED BY APPELLANTS WAS  
SUFFICIENT FOR THEIR CASE TO GO TO THE JURY

1. The suppliers of twelve leading brands of major appliances  
and/or television sets refused to deal with Manfree

This basic circumstance is either admitted, or ignored and thus admitted by implication, in the briefs of appellees Frigidaire, G.E., Borg-Warner, R.C.A. and Whirlpool. (See, e.g., Frig. Br., pp. 5-6; G.E. Br., pp. 24-25; B.W. Br., pp 14, 26, 29-30; R.C.A Br., pp. 5, 10; W.P. Br., pp. 5, 11-15, 18.) Maytag West Coast admits its refusal to deal (M.T. Br., p. 4), but then

argues at length concerning its alleged justification for doing so. Only California Electric denies a refusal to continue to deal with Manfree. (Cal. El. Br., pp. 7-14.) In so doing it ignores the testimony of Mr. Bernard Freeman, an officer of Manfree, concerning appellants' experiences with this vendor and its failure to enter into commercial arrangements despite a succession of requests. (See App. O.B., pp. 41-44, 55-56, and 75-76.)

**2. Some suppliers did sell to Manfree for periods of time, but subsequently they all refused to continue to deal with Manfree**

The probative effect of a series of cutoffs by major suppliers, one by one, is ignored, by all appellees, excepting California Electric. (Cal. El. Br., pp. 11-12.)

**3. Statements by representatives of suppliers at times of refusals to deal with Manfree**

a. *Jack Mitchell conversation:* Mr. Freeman of Manfree testified that Mr. Jack Mitchell, a representative of co-conspirator W. J. Lancaster Co., told him in 1957 that Lancaster had been subjected to pressure from representatives of co-conspirator Hale not to sell to Manfree; that Lancaster held a meeting to discuss that situation; then Lancaster's management decided under such circumstances not to sell to Manfree any longer. (Tr. 5808-5809.) But this testimony is ignored by all appellees' briefs, except those of Frigidaire and Borg-Warner. They urge that the reason for the refusal of distributor Lancaster to deal with Manfree was because of its so-called "bait and switch" advertising. (B.W. Br., pp. 13-14; Frig. Br., p. 29.)

However, on a motion for a directed verdict it should be assumed true that the reason why Lancaster refused to further deal with Manfree was, as its sales representative said, because of pressure from Hale. Appellees cannot adopt an inconsistent and contrary position to the testimony of Mr. Bernard Freeman. That testimony was admitted by the trial Court to establish the conspiracy, and is a major part of the sum total of evidence proving the existence of a conspiracy to boycott appellants. Mr. Mitchell was given authority by Lancaster to see Manfree's representatives and inform them of the refusal to deal. (Tr. 2594.) Cf. *Flintkote Company v. Lysfjord*, 246 F.2d 368, 384-385 (9th Cir. 1957). Borg-Warner argues that it is prejudicial error to have allowed the testimony into evidence. (B.W. Br., pp. 37-40.) Clearly, Mr. Mitchell's statements to Mr. Bernard Freeman of Manfree was properly admissible in evidence under this Court's ruling in *Esco Corporation v. United States*, 340 F.2d 1000, 1007, 1009-1013 (9th Cir. 1965). Borg-Warner argues (B.W. Br., pp. 38-39) the conversation between Mr. Mitchell and Mr. Freeman is analogous to the testimony of Mr. Lysfjord as to what Mr. Krause, a co-conspirator, told him on the telephone in *Flintkote Company v. Lysfjord*, *supra* at p. 386. But the Krause, Lysfjord conversation took place after the severance of relations between Flintkote and the plaintiffs, and after the conspiracy was found by the Court to have ended. (246 F.2d 381.) Here the statement of Mr. Mitchell explained Lancaster's refusal to deal and was part of the res gestae. In *Flintkote*, further, there was no

evidence showing that Coast Insulating Products (Mr. Krause's employer), was affiliated with defendant Flinthkote Company, other than through the conspiracy. Here there is independent evidence that Lancaster was an agent of Borg-Warner in the advertising, promotion and sale of Borg-Warner's Norge products: the evidence showed meetings between Mr. Bull of Norge Sales, Mr. W. J. Lancaster and Gilbert Freeman of Lancaster and Ed Bonnet of Graybar, Los Angeles, at the Villa Hotel, San Mateo, in April 1959 (App. O.B., pp. 51-52), and that Borg-Warner/Norge Sales<sup>2</sup> controlled the disbursement of advertising funds to retailers. (Pl. Ex. Nos. 46-48, 644, 4098, B, G, H, 4099, 4101 A to K, 4102, 4055 (Court Ex. No. 1), 4357, 4351-4353, 4359-1.)

Borg-Warner clearly cannot enter into, as it did, extensive local advertising and promotional arrangements with its distributor, funding the distributor with a 100% subsidy for local advertising costs to be allocated to the key retailers Hales and Macys under the distributor's supervision, and then claim that

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<sup>2</sup>Appellees Borg-Warner and Norge Sales strain mightily (B.W. Br. pp. 8-10) to establish here what they utterly failed to do in the trial court: that Borg-Warner and Norge Sales are unrelated, independent companies. They admit "Norge Division" was part of Borg-Warner (B.W. Br. p. 8), that Judson Sayre was president of Norge Division as well as Norge Sales (Tr. 2502), but then claim he was not a "corporate officer" of Borg-Warner! (*Ibid.*) (See Tr. 2493-2494). These "separate entities" had common officers (Tr. 2494-2501, 2525), common office locations (Tr. 2502-2510), common financial and sales planning (Tr. 2494-2499, 2514-2520), interconnected financing (Tr. 2530-2532). The trial Court expressly found this "contention . . ." of a ". . . separate corporate entity", from the wealth of evidence to the contrary, was a proper jury question (R. 1962). See, also, the trial Court's comments on the particular issue during trial (Tr. 2946-2951).

the distributor is not its agent in the local market. (See testimony of Gil Freeman, Tr. 2677, 2680, 2682-2688.) "The existence of an agency is a question of fact (*Brokaw v. Black-Foxe Military Institute*, 37 Cal. 2d 274, 278 . . .) which may be implied from the conduct of the parties. *Smith v. Schuttpelz*, 1 Cal. 2d 158, 161 . . .". *Thayer v. Pacific Elec. Ry. Co.*, 55 C. 2d 430, 438 (1961). The agency relationship may be established by circumstantial evidence; for this purpose all evidence about the relation of the parties casting light on the character of their relationship is admissible. *Bergtholdt v. Porter Bros. Co.*, 114 Cal. 681, 688 (1896). See *Rest., Agency* (2d), Section 14 N (1958). The evidence noted above establishes existence of an agency in this case.

It is respectfully urged that in considering appellees' motions for a directed verdict, it must be taken as true that the reason for Manfree's cancellation with respect to the Norge line was because Hale told Lancaster that it could no longer sell to Manfree and Hale at the same time, and that under this pressure co-conspirator Lancaster decided not to sell to Manfree.<sup>3</sup>

b. *John Muntain conversation:* California Electric sales representative Mr. John Muntain told Mr. Bernard Freeman in September, 1958, that his company ceased selling Philco appliances to Manfree be-

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<sup>3</sup>It is important to note that Gil Freeman, who testified it was decided to cut off Manfree because of appellants' advertising (B.W. Br. p. 14), testified that he *never* mentioned such advertising to appellants, or discussed it with them, or even told them what was objectionable (Tr. 2887-2890).

cause of pressure upon California Electric from other San Francisco retail stores not to continue to do so.

This testimony is ignored by the appellees, with the exception of California Electric (Cal. El. Br., pp. 11-12) and Frigidaire (Frig. Br., p. 29). California Electric quotes *verbatim* the testimony of Mr. Freeman concerning Muntain's statement to him (Tr. 5736-5737), but asks this Court to draw different inferences from the testimony (Cal. El. Br., pp. 11-12). In so doing, it ignores the ruling of this Court in *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196, 200-201 (9th Cir. 1963) where it was specifically held that a letter referring to "stocking jobbers" as a general class of merchants who were upset over price-cutting, permitted the inference that plaintiff's competitor was one of the complaining jobbers. By analogy, the jury could reasonably infer from the testimony of Mr. Bernard Freeman that the "other stores" referred to by Muntain meant the large local "key" accounts, such as co-conspirator Hale. It could further reject the interested testimony of Mr. Muntain that he couldn't recall this conversation (Cal. El. Br., p. 11), and that Manfree was not interested in obtaining Philco appliances from his company, especially when the record showed that Mr. Valenson of California Electric told Mr. Freeman that Muntain had lied in his [deposition] testimony. (Tr. 5862-5863.)

c. *William Mayben conversation:* Co-conspirator Graybar's representative, Mr. W. H. Mayben, told Mr. Freeman in October 1958, that Graybar (local

Hotpoint distributor) would be unable to sell to department or other stores, so long as it was selling to discount stores, and that therefore Graybar would no longer sell Hotpoint appliances to Manfree (App. O. B., pp. 45-46).

Appellees ignore this testimony, including appellee Hotpoint. It discusses (G.E. Br., pp. 22-23) its version of the circumstances of Graybar's termination of the Manfree franchise, but it ignores entirely the direct evidence that a representative of its local marketing agent, Graybar, told Mr. Freeman that Graybar would be unable to sell to department stories if it sold to discount stores, and therefore Graybar would no longer sell Hotpoint appliances to Manfree. Appellees no doubt intentionally sidestepped this evidence because it was directly corroborated by the testimony of Mr. Vern Brown (Tr. 6120-6125).

d. *Cancellation of Manfree's franchise by Maytag:* Manfree's franchise was cancelled by Maytag West Coast on March 10, 1959, immediately following a period in which Hale would not buy or advertise Maytag products. Almost coincidental in time with Manfree's cancellation, Maytag sold \$11,000 in Maytag appliances to Hale (App. O.B., pp. 46-47). This fact is admitted by the appellees, as it cannot be denied.

Maytag takes the position that the Court should adopt its arguments as to what inferences should be drawn from this fact (M.T. Br., pp. 26-27). But clearly the trier of fact is to draw the conclusions from unusual circumstances such as disclosed by this

large purchase order. The cases cited by Maytag (M.T. Br., pp. 26-27) are beside the point. Appellants do not argue that Manfree's right to Maytag goods depends upon dealer tenure. It does argue that it is unlawful to deny products to it pursuant to a boycott conspiracy, *United States v. General Motors Corp.*, 384 U.S. 127, 141-143 (1966), and, this circumstance is indicative of competing retailer pressure upon Maytag. Indeed, the arguments advanced by Maytag are shown to be incorrect. Thus it argues (M.T. Br., p. 6) that other dealers were not renewed at the same time that Manfree was disenfranchised. It mentions Lachman Bros., Sterling and Redlick's. But Pl. Ex. No. 318 shows that Sterling was franchised by Maytag on October 14, 1959; Pl. Ex. 325 shows that Redlick's was franchised May 25, 1959 (see Tr. 3334-3335), and Pl. Ex. No. 641 shows sales by Maytag West Coast to Lachman Bros. in 1960. Thus the retail accounts mentioned as having been cancelled by Maytag along with Manfree, were all allowed to acquire Maytag appliances and did so, with the exception of Manfree.

Frigidaire (Frig. Br., p. 29) adopts the arguments of Maytag, and completely ignores the legal principle that the jury is the only body to draw the inferences from the evidence.

e. *Cancellation of shipments from Graybar in Los Angeles:* Graybar's Los Angeles outlet refused to continue to ship Norge appliances to Manfree, because Borg-Warner and Lancaster requested it not to sell in Lancaster's "territory".

This evidence is ignored by the appellees, with the exception of Borg-Warner, which spends considerable length arguing what the jury should find to be the significance of the Villa Hotel meeting (B.W. Br., pp. 43-47). Clearly, the jury is entitled to find that the purpose of this meeting was to insure, at Hale's request, that discount stores not be supplied Norge appliances in San Francisco County.<sup>4</sup> There was direct testimony by Mr. Gil Freeman that he asked Mr. Bonnet, in the presence of Mr. Bull, an officer of Norge Sales (Tr. 5365, 5383-5384) not to sell or tranship Norge appliances into San Francisco (Tr. 2592).

The fiction that this meeting was designed to settle warranty obligations is dispelled by Bonnet's letter (Pl. Ex. No. 4023). He there indicates that he considers the whole affair to be unfair, penalizing Graybar for transshipping into another distributor's territory. Pl. Ex. No. 4029 shows how important the transshipping was to Norge who otherwise pretends a manufacturer's disinterest in local retailing.

#### **4. Evidence of conspiracy from common refusals to deal**

Seven lines of television sets, comprising virtually all of the leading brands, were denied to Manfree

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<sup>4</sup>There was extensive evidence, pointedly ignored or demeaned by appellees, of meetings between officers of Norge Division, and Norge Sales, and representatives of distributors (including Lancaster) and retailers (including Hale) at trade shows and elsewhere (Tr. 510-513, 521-523, 529-538, 545-547, 1371-1374, 1400-1405, 2358-2360, 2362-2365, 2682-2688 [after impeachment of Gil Freeman], 2758-2764, 2825-2826, 2914-2918, 2963-2964, 5387-5389). Similarly, it is undisputed that Hale was a "key dealer" for Norge in the San Francisco County market (Pl. Ex. Nos. 4098, 4099; Tr. 2374-2375, 2669-2673, 2697-2700, 2745-2750, 2758-2764).

during the period of 1957 to 1964, i.e., R.C.A., Philco, G.E., Motorola, Westinghouse, Zenith and Sylvania (1958-1963). Similarly, the leading brands of major appliances, i.e., G.E., Philco, Norge, Maytag, Whirlpool, Hotpoint, Frigidaire and Westinghouse, were denied to Manfree during the same period, except for a limited period when some of these brands were sold to appellants on a "no-name/no-price" advertising basis only (Tr. 5725; offer of proof at Tr. 5783-5784).

The appellees argue that no adverse inferences to them may be drawn from these circumstances, stating that there is no "conscious parallelism" due to the fact that all refusals to (continue to) deal did not take place on the same day, that the length of time involved indicates unrelated action, and that the various vendors all had different reasons. But the facts show that Manfree did not have any of the leading brands of television sets available to it in competition with the major retailers of television sets in San Francisco County, and, after April 1959 none of the leading brands of major household appliances. There was parallelism in the common refusals to deal all through this period of time, in the fact that Manfree lost its suppliers one by one, and in the fact that it was unable to acquire these lines. As indicated above, there were conscious refusals to deal by competitors in an over supply market. The defendants here are asking this Court to do precisely what the plaintiff in *Theatre Enterprises v. Paramount Film D. Corp.*, 346 U.S. 537 (1953), asked the Supreme Court to do: rule that inferences stemming from a refusal to deal by com-

petitors require a directed verdict. The Supreme Court held that such inferences were a question of fact for the jury, and that it would be error to hold as a matter of law that such refusals to deal constituted an agreement, it being up to the jury to determine from the evidence whether an agreement to boycott existed. Appellees therefore ask this Court to do exactly what the Supreme Court ruled against (only in the context of a plaintiff's argument in that case).

##### **5. Appellants' letters to vendors requesting product**

In June and July of 1960, the vendor appellees and co-conspirators all received letters from Manfree urgently requesting the right to purchase the lines they sold, but they uniformly refused to deal with appellant in spite of what was a reasonable request that Manfree be franchised and allowed to carry such lines. Refusals to deal by appellees and others continued through August, 1964 (when the second complaint was filed).

Appellees argue that these letters were manufactured by an attorney, and Borg-Warner attacks the good faith of these letters (B.W. Br., p. 33, n. 32). The answer to Borg-Warner's allegation is that Manfree in 1959 ordered carload lots of Norge merchandise from the Los Angeles territory, indicating that it indeed was willing to acquire Norge merchandise in carload lots (Pl. Ex. No. 4019.) Further, arguments as to the good faith of the letters, or the fact that they were written on the advice of counsel, are properly addressed to a jury, not to this Court.

Such arguments concerning letter requests as a matter of law have been resoundingly answered by this Court as in *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957).

#### 6. Alleged reasons for refusals to deal

The companies that refused to deal with Manfree, when asked to do so, could offer no convincing reasons for the refusal to deal. They only claim that such decisions were based on some ethereal, general "policy" grounds. Maytag and California Electric attempted to show more specific reasons; however, such "reasons" once again only presented the issue of "who (what) do you believe" for the trier of fact.

The manufacturer appellees answer this statement by claiming that their distribution arrangements provided that they do not sell to retailers. This defense will not support or justify a refusal to sell which supports a conspiracy to boycott. *Klor's, Inc. v. Broadway Hale's Stores, Inc.*, 359 U.S. 207 (1959). Nor may the manufacturer appellees refuse to sell to retailers in support of a geographical territorial limitation which prevents competition among distributors. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378-379 (1967). Nor may these refusals to sell be pursuant to a program and plan among manufacturers to establish a fixed and rigid distribution system as to television sets and major appliances in the United States, and not be illegal (*Ibid*). It is for the jury to conclude, based upon all the facts and evidence, whether or not these manufacturer appellees were

directly supporting a conspiracy to boycott in San Francisco County. Illustrative of that evidence applicable to the manufacturers is the following:

Appellee Borg-Warner (through Norge Sales) was shown to be directly involved in a boycott of appellants, by attendance of Norge Sales representatives at the hotel meeting in San Mateo, and in its refusals to permit sales to Mr. Green as agent for U.S.E. in Los Angeles.<sup>5</sup> Graybar was shown to discuss the franchising of discount stores with Hotpoint (Pl. Ex. No. 482). Hale entered into direct discussions with representatives of R.C.A. and Whirlpool in which Hale made known its need for a minimum 30% markup on appliances (Pl. Ex. Nos. 349, 350; Tr. 270-271).

The jury could find from evidence of the trade customs and practices followed by R.C.A., that it had full knowledge of the coercive price policy imposed on local retailers by its distributor, A. H. Meyer Co. R.C.A. had complete control over the manner in which its advertising funds were being utilized in the local market. It employed field sales representatives whose duty was to confer with and discuss sales matters with distributors; these representatives met with distributor representatives several times a month (Tr. 1215-1217, 1307-1308, 4689, 4732-4736, 4749-4751, 4766), and periodically called upon local retailers (Tr.

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<sup>5</sup>As to appellees' contention (B.W. Br. p. 46) that there was *no* evidence that Green was cut-off as U.S.E.'s buying agent for Norge products, there is Green's stricken testimony that Bonnet of Graybar refused further orders and threatened to take Green's company ". . . off the list too" if he persisted (Tr. 5515-5519).

1307-1308, 1914-1916, 4693-4696, 4699-4700, 4708, 4768, 4769, 4819). R.C.A. held regional trade shows for distributors once or twice a year, attended by representatives of Meyer, and held national trade shows, where its officials met with distributor and (upon occasion) retailer representatives. (Tr. 510-513, 545-547, 551-558, 4682-4686, 4782, 4797-4798, 4860-4861.) They also attended distributor trade shows. (Tr. 557-558, 1914, 1238-1240, 4701, 4814.) They discussed local problem with retailers, in direct meetings with them. (Pl. Ex. Nos. 349 and 350; Tr. 222-259.) It advertised directly in the local market. It authorized Hale a special 60% for unverified advertising costs although its policy statements provided for 50% maximum. (Pl. Ex. Nos. 1846; 99.)

Whirlpool had direct contacts with Hale (above, and Tr. 564-567 (background) 571-579), made it its key account or manufacturer's representative in San Francisco County, and gave it special advertising allowances no other retailer obtained. (Pl. Ex. Nos. 685, 689, 4236, 4237.)

The arguments advanced for the refusals to deal by the appellees are unconvincing. Even if not, they do not approach the realm of certainty which precludes determination by the jury of the validity of the reasons asserted. *Standard Oil Co. of California v. Moore*, 251 F. 2d 188 (9th Cir. 1957); *Girardi v. Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196 (9th Cir. 1963). The extensive boycott of appellants could not operate successfully without the support of the manufacturers who conduct business themselves for

their own account in every major market in the country.

The reasons advanced by California Electric, i.e., that Manfree chose not to buy Philco appliances from California Electric, was completely discredited as shown above. The testimony of Muntain regarding the supposed disinclination of Manfree to buy is refuted by his statements to Mr. Freeman and by the statement to Mr. Bernard Freeman of his own superior, Mr. Valenson (California Electric Sales Manager), that there indeed was a conspiracy to deprive Manfree of product. It is further impeached by the circumstances that in June, 1960, Manfree desired to but was unable to buy Philco appliances (Pl. Ex. No. 1783), and is further refuted by the fact that such refusal to deal continued during the entire period of time that California Electric handled the Philco line, until 1963 (Ap. O.B., pp. 55-56). Indeed, the arguments of California Electric are easily answered by reference to the fact that if the local market were highly competitive, there should have been a constant succession of California Electric salesmen to Manfree soliciting business. Of course, this did not occur (Ap. O.B., p. 56).

Frigidaire's arguments are refuted when it is shown that Frigidaire at no time before trial disclosed to appellants the reason now advanced to this Court for its refusal to deal: Manfree's allegedly cramped and unattractive premises (Frig. Br., p. 29). Instead, Mr. Hamilton, appellee's Appliance Sales Manager, pointedly told Mr. Freeman of Manfree that a Frigidaire

representative would be wasting his time to visit Manfree, as Frigidaire did not sell to discount stores Tr. 5825-5829).<sup>6</sup> Frigidaire saw to it that the notations concerning this telephone call to Mr. Freeman shown on Pl. Ex. No. 491 were erased. Thus, Frigidaire's evidentiary arguments ignore basic testimony directed against it and that its defense was impeached.

Likewise, although now claiming that so-called dealer structure was the reason that it refused to sell to Manfree, G.E., shown to have an enforced retail price policy operating in San Francisco, believed that it could not sell to Hale and Manfree at the same time. Pl. Ex. No. 514, involving the question of G.E. selling to Manfree, contains notations "Hale" and "discount houses doing a tremendous volume of major appliance business," wherein it is apparent that when Mr. Walker, G.E. regional vice president (Tr. 4130), discussed with Mr. Gough of G.E. the question of selling to Manfree (a discount store), Hale was discussed, as was GET (Tr. 4169, 4176-4177). The evidence also showed that Mr. Gough did not disclose to Mr. Walker the fact that Manfree had requested a five carload purchase from General Electric (Tr. 4180-4181). Further, the evidence disclosed that

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<sup>6</sup>Frigidaire claims that Mr. Freeman "clearly understood Hamilton to be referring to "closed-door" discount stores (Frig. Br. p. 37, n. 55). This misstates the witness' testimony on cross-examination by this appellee (Tr. 6037). Mr. Freeman said that Hamilton could have said "closed-door operations" or "discount stores", as at that time (1960) these terms "meant the same thing" (*Ibid.*). The basic Frigidaire policy—refusal to sell to a particular class of dealer—is clear.

U.S.E.'s radio and small appliance concession (Camrose) purchased large quantities of G.E. radios and small appliances from G.E. (Pl. Ex. No. 517; Tr. 4177-4179), and yet its major appliance concessionaire was unable to buy major appliances from the same supplier. The same situation applied to Lancaster, Graybar, and Westinghouse (Spec. of Error, V, I, 8, pp. xlvii-xlviii). A jury could readily conclude that there was something else than "cramped" store space that induced such vendors to deny the subject products to Manfree at the same time.

The type of dealer structure that G.E. had in mind further is exposed in Pl. Ex. For Id. Nos. 5032, 5033, 5034-5044 (described in Spec. of Errors, V, C, 1, at pp. xv-xvi) which shows what G.E. wanted for the local retail market was a dealer organization that did not engage in retail price competition and maintained high retail margins along with the other appellees. This would require Manfree's exclusion.

Maytag claims that Manfree was an undesirable account to which it was unwilling to sell. This is directly refuted by the statement of Mr. Mitchel of Maytag West Coast to Mr. Freeman that Maytag would no longer sell to Manfree because it was no longer going to sell to discount stores in San Francisco due to a change in its policies (Offers of Proof at Tr. 6059-6064). The trial testimony of Mr. Mitchel as to his "decision" not to sell to Manfree was impeached with his deposition testimony. At that earlier time, Mitchel, for some reason, could not give the "important" reasons for the cancellation, which sud-

denly occurred to him at trial (Tr. 3419, 3030).<sup>7</sup> Maytag claims that Mitchel noted in his deposition that a Manfree salesman "smelled like a distillery" (M.T. Br., p. 16, n. 9). But Mitchel did *not* go on to say this was the grounds for termination.

That the reasons for refusing to deal with Manfree advanced by the appellees are trial defenses and not dispositive of liability is further shown by the fact that these companies or their distributors *all* adopted policies of inducing the advertising of their appliances or television sets at manufacturer's list price (Ap. O.B., pp. 32-36). It is certainly logical to conclude that discount stores, as advertised "price-cutters", would threaten these policies. Why else would Graybar, local representative for Hotpoint, call a meeting of key retail dealers and openly announce that it was no longer going to sell to discount stores in San Francisco County? (Tr. 6120-6125). The testimony of Mr. Vern Brown, former District Manager of Graybar, was that a breakfast meeting was held at the Palace Hotel with representatives of the key retailers in San Francisco, where Mr. Mayben (Graybar Manager) announced that Graybar's distribution policy had changed, in that "that we were no longer serving or franchising discount-type houses" (Tr. 6125).

#### **7. Manufacturers' list prices as retail prices**

Each appellee manufacturer admittedly published retail list prices as of the time of the filing of the

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<sup>7</sup>Apart from Mr. B. Freeman's testimony, the evidence showed that Maytag changed its policies in San Francisco in April 1959 by favoring Hales and refusing to sell to Manfree and GET.

first complaint (G.E. Br., pp. 10-11; Frig. Br., pp. 9-10; R.C.A. Br., p. 5; W.P. Br., p. 6; B.W. Br., p. 15). They also allocated millions of dollars for newspaper advertising for their products, as they tacitly admit. However, appellees argue that no inferences can be drawn from the fact that advertising allowances were tied directly to advertising at the manufacturer's list price. They say the distributors adopted their own suggested prices. But whether or not the distributors followed the factory prices was a jury question, based on the evidence.

Whirlpool argues that Meyer did not follow its list prices in Meyer's suggested retail prices (W.P. Br., pp. 6-7). Yet the evidence disclosed that Meyer adopted the *exact* Whirlpool prices 60% of the time (Pl. Ex. No. 5115).

R.C.A. also argues that Meyer didn't adopt its suggested retail prices (R.C.A. Br., p. 5). Yet, Pl. Ex. No. 1947 (R.C.A. price sheets) and Pl. Ex. No. 1948 (Meyer price sheets) show that Meyer's suggested retail prices were either identical to, or clearly based upon R.C.A. list prices. From Pl. Ex. No. 5116 (comparing these prices), the jury could reasonably conclude that Meyer followed R.C.A.'s list prices (Meyer's prices were the same as, or were an even \$10 or \$20 higher, 71.14% of the time).<sup>8</sup>

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<sup>8</sup>R.C.A., among others, apparently feels it is the law that nothing short of 100% conformity permits the finding of a price-fixing conspiracy (R.C.A. Br. p. 5; W.P. Br. pp. 22-23). Such is not the law:

"... Hence, prices are fixed within the meaning of the Trenton Potteries Co. Case if the *range* within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they

Although the evidence showed (*supra*) that the manufacturer appellees and their distributors worked closely in all areas of distribution, it is argued by the manufacturers that, as a matter of law, a jury could not conclude that the factories knew of the distributors' cooperative advertising programs, or other activities in the local market, including retail price levels. The refrain in the briefs is overwhelming that the factory appellees did not even know the local retail market. However, the Supreme Court in *Albrecht v. The Herald Co.*, 19 L. Ed. 2d 998 (1968), recently authoritatively disposed of the fiction that the modern manufacturer is not directly involved in local retail markets:

“Our Brother HARLAN seems to state that suppliers have no interest in programs of minimum resale price maintenance, and hence that such programs are ‘essentially’ horizontal agreements between dealers even when they appear to be imposed unilaterally and individually by a supplier on each of his dealers. Although the empirical basis for determining whether or not manufacturers benefit from minimum resale price programs appears to be inconclusive, *it seems beyond dispute that a substantial number of manufacturers formulate and enforce complicated plans to maintain resale prices because they deem them advantageous.* (Citations omitted). As a

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are to be uniform, or if by various formulae they are related to the market prices. *They are fixed because they are agreed upon.*” [Emphasis added.] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223 (1940).

From the degree of similarity noted, the jury could reasonably conclude that vertical price-fixing combinations existed. *Esco Corporation v. United States*, 340 F.2d 1000, 1006-1007 (9th Cir. 1965).

theoretical matter, it is not difficult to conceive of situations in which manufacturers would rightly regard minimum resale price maintenance to be in their interest. Maintaining minimum resale prices would benefit manufacturers when the total demand for their product would not be increased as much by the lower prices brought about by dealer competition as by some other non-price, demand-creating activity. In particular, when total consumer demand (at least within that price range marked at the bottom by the minimum cost of manufacture and distribution and at the top by the highest price at which a price-maintenance scheme can operate effectively) is affected less by price than by the number of retail outlets for the product, the availability of dealer services, or the impact of advertising and promotion, it will be in the interest of manufacturers to squelch price competition through a scheme of resale price maintenance in order to concentrate on nonprice competition. Finally, if the retail price of each of a group of competing products is stabilized through manufacturer-imposed price maintenance schemes, the danger to all the manufacturers of severe interbrand price competition is apt to be alleviated." [Emphasis added.] (19 L.Ed. 2d 998 at 1003 n. 7.)

But whether, based upon the facts that (a) factory representatives called on the local distributors many times during the month; (b) the distributors handled, as intermediaries, factory advertising and promotional programs; (c) there were factory-sponsored trade shows in which distributors (and retailers) were in attendance; and (d) the manufacturers

advertised their products in local papers at factory prices, it is true or not that the factory appellees did not know of the distributors' coercive price policies with retailers, and approved or ratified them, is purely a jury question. There was sufficient evidence for the jury to conclude that it is a fiction for the appellees to argue that they did not know of and support a distributors' advertising policy.

R.C.A.'s defense of ignorance is torn asunder by Pl. Exs. for Id. Nos. 343 and 344. A jury could reasonably conclude that if Meyer had absolute freedom to vary its suggested retail prices from that of the manufacturer, it would not request the manufacturer to change its list prices. If such absolute discretion existed, senior officials of R.C.A. would not logically discuss such a request from the distributor. But Exhibit Nos. 343 and 344 are proof of serious discussion of such requests. No. 343 shows that A. H. Meyer, Meyer's President, telephoned Mr. Siedel of R.C.A. concerning this list price question. (Mr. Siedel was an executive officer of R.C.A. with offices in New York City (Tr. 216-221).)

Exhibit for Id. No. 343 further identifies models as to which Meyer requested R.C.A. for an increase in manufacturer's list price. Comparison of Pl. Ex. No. 1947 G, H (R.C.A.'s price list) with Pl. Ex. No. 948 (Meyer's price list) shows that Meyer was using the precise R.C.A. list price on these models to its retailers in San Francisco. This is convincing additional proof that Meyer was not free to set suggested list prices as desired, but pursuant to common under-

standing with R.C.A. was compelled to discuss list price changes with it. San Francisco was a high margin area for retailers, and the appellees involved herein saw to it that it remained such (Pl. Ex. No. 4227).

Maytag denies that it had a suggested list price advertising policy. In so doing, it ignores Pl. Ex. No. 337 (Ap. O.B., p. 33). Instead, Maytag urges that as a matter of law the Court is bound to accept its documentary evidence as conclusively showing that there was price competition in San Francisco (M.T. Br., pp. 12-13).<sup>9</sup> An analysis of this evidence permits the conclusion that the distributor was directing retail prices, as the prices shown in these advertisements did not vary more than a few dollars, one from one another.<sup>10</sup> And, Pl. Ex. for Id. No. 565 (Maytag informed Manfree that it was not to advertise Maytag products with prices shown) is indicative of Maytag's policy of maintaining suggested prices in advertisements on Maytag products. Why else would this stricture be imposed?

G.E. also disclaims a suggested list price policy in the advertising of its product (G.E. Br., pp. 10-13). It (as Maytag) ignores appellants' direct evidence to

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<sup>9</sup>The testimony of Sanford of Hale, cited by Maytag (Tr. 719-722) contains the admission that this co-conspirator retailer followed Maytag's list prices (but not in every instance). In addition, the comparative prices shown in Pl. Ex. No. 4346-B goes only to Hale's secret pricing by which the merchandise is given a tag price at suggested list but the salesman is allowed a lower sell price (Tr. 603, 722-725).

<sup>10</sup>See Appendix A, attached hereto.

the contrary: Pl. Ex. Nos. 708, 714, and 717; see also Pl. Ex. Nos. 4127, 4128, 4129, and 4130.

Appellees Frigidaire, G.E., and Hotpoint, and co-conspirators Meyer, Westinghouse, and Graybar, agreed to maintain the advertised prices of major appliances at suggested prices, as shown by Pl. Ex. No. 2090. This is also evidence of agreement by retailers to maintain *their* prices at manufacturers' suggested retail prices. This exhibit refers to a group directed sales campaign of the Northern California Electrical Bureau. It shows the purposes, intent and meeting of minds of these appellees to base tag price at manufacturer's list price. (Pl. Ex. No. 2090 is dated January 1959, and is a graphic illustration of distributor and retailer common thinking on use of list prices during this period of time.) Not only were these vendor appellees members of the N.C.E.B., but at the same period also members were Hale (Tr. 904-907, 948-950, 990-992), Sterling (Tr. 1929-1931), Lachman Bros. (Tr. 1927-1934), Macy's (Tr. 1929-1931), and Redlick's (1929-1931).

**8. Knowledge of vendor defendants that local defendant retailers controlled the advertising of the subject products in the local market**

Each of the vendor appellees and co-conspirators had common knowledge that the large furniture, department or appliance stores in San Francisco controlled the advertising of these major consumer products in the local newspapers, and that such retailers' advertised prices were based on the vendors' list prices (Ap. O.B., pp. 119-121).

This situation is ignored by the appellees in their briefs, except for their contentions that prices were not advertised at vendors' list prices which is contradicted by direct evidence to the contrary.

#### 9. Morning newspaper boycott

U.S.E.'s repeated requests to the two morning San Francisco newspapers to be allowed to advertise were denied, at a time when the co-conspirator retailers were the dominant advertisers in such newspapers (*infra*). Appellees argue that this Court as a matter of law must draw the inference that each newspaper independently, and without pressure from the conspirators, had a policy of not allowing "closed door" stores or discount stores to advertise.

But the inference from the facts of refusal to permit advertising is to be drawn by the jury. Clearly, Borg-Warner Ex. No. 9024 was direct evidence that it was pressure from Hale which prevented the newspapers from taking discount store advertising. Even assuming the correctness of the Court's ruling in striking Ex. No. 9024, that the refusals to deal by the morning newspapers was pursuant to the conspiracy charged was shown by the circumstances involved. In addition to the rank newspaper discrimination involved, the evidence showed extensive advertising in those newspapers by Hale and the other co-conspirator retailers (Pl. Ex. No. 4370; Tr. 323, 329-332, 1842-1845, 2305-2309); that Lachman admittedly refused to advertise in the afternoon newspaper because U.S.E. advertisements were carried (Tr. 2035-2046);

that Hale's advertising was substantially reduced in the afternoon newspaper in 1959 while it carried U.S.E. advertising (Tr. 332-333); and that the morning newspapers gave special combined rate advantages to Hale's and Dohrman Commercial Co. (Tr. 299-317). (See Ap. O.B., pp. 52-53). The record showed that co-conspirator the *San Francisco Chronicle* believed it to be to its best interests to first call Macy's and determine its reaction toward allowing discount stores to advertise (Tr. 6879-6880). Clearly, under this Court's decisions in *Girardi v. Gates Rubber Company Sales Division*, 325 F.2d 196 (9th Cir. 1963), and *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), it was for the jury alone to determine the significance of this telephone call, especially in view of the fact that following the call U.S.E. was not allowed to advertise in the *Chronicle*. Contrary to the argument of some appellees (e.g., Cal. El. Br., p. 42; Frig. Br., p. 35) that the local newspapers only had an indiscriminate policy against accepting advertising from stores that required membership cards for admission, it was shown that "Tops", another discount store, was allowed to advertise in the *Chronicle*, even though it did request customers to sign cards (Tr. 6888). What manifestly occurred is that the conspiracy in San Francisco decreed that discount stores were not to go into major appliance and television set retail business, in competition to the conspiracy, and this included the denial of newspaper advertising. The newspapers, in short, gave in to the same pressure exerted as sup-

pliers of the television sets and major household appliances.

**10. Boycott of GET, another discount store in San Francisco County**

Appellants were not the only discount operation in San Francisco County unable to obtain the leading brands of such merchandise. The other discount store then in existence in San Francisco, GET (Lakeshore Furniture), was also unable to obtain such products.

Frigidaire (Frig. Br., pp. 6, 32) and Borg-Warner (B.W. Br., p. 14) seek to have this Court believe that GET was supplied with the Norge and Hotpoint appliances, and Westinghouse appliances or television sets, and that as a matter of law this Court must find that GET never expressed interest in carrying the Frigidaire line. Appellees, however, do not make it clear that Graybar refused to sell Hotpoint products to, or disenfranchised GET, at the same time it disenfranchised Manfree, in the fall of 1958 (Tr. 3068-3069). Graybar did not franchise GET until it was acquired by GEM in 1962 (Tr. 3190). It is significant to note that Graybar felt it lacked sufficient authority to sell Hotpoint appliances to GEM (GET) until it discussed the matter with Hotpoint (Pl. Ex. No. 482). Appellees do not inform the Court that Westinghouse did not sell to GET until April, 1961 (Tr. 6169). Nor do they observe that GET could obtain only trifling supplies of Norge appliances after 1959 (Pl. Ex. No. 5121). The testimony referred to by Frigidaire (Frig. Br., p. 6, f.n. 8) that GET's appliance concessionaire never requested Frigidaire's products, must be re-

ceived as an advocate's argument about the facts. It is very difficult to believe, and the jury was certainly not required to, that the related conference between representatives of Frigidaire and GET's appliance concessionaire did not involve a request to acquire products. Thus, the record shows that GET was excluded from the same products denied Manfree, for virtually the same period of time.

**11. Sales by defendant vendors to discount stores located outside of San Francisco**

However, while appellants and GET *in San Francisco County* were subjected to the boycott, some of the vendor conspirators were readily selling major appliances and television sets to other discount stores, situated in San Jose and Oakland (after Hale closed its San Francisco appliance store operations in 1963). (Spec. of Errors, V, I, 6, pp. xliii-xlv.) Appellees do not argue with this fact. From this evidence, the jury could conclude that these suppliers found nothing wrong with discount stores *per se* as dealers, but only retailers of that type situated in San Francisco who were a threat to the conspiracy market in San Francisco.

**12. Special terms in the purchasing and advertising of the subject products, favoring the co-conspirator retailers**

Existence of special discriminating terms in the purchase and advertising of major appliances and television sets was established, by direct evidence, between the conspirator vendors and Hale, and four other local co-conspirator retailers (Ap. O.B., pp. 37-

41). These retailers received the bulk of "special" advertising dollars in the local market from such vendors, and therefore were the key advertisers of such products in the San Francisco newspapers.

Frigidaire avoids discussion of its "key account" program (Frig. Br., p. 44). California Electric attempts to avoid the issue by arguing that Philco itself handled arrangements with Hale directly (Cal. El. Br., p. 6). But see Ap. O.B., pp. 40-41; Pl. Ex. Nos. 1847-1898. California Electric Supply supervised Philco Associate Distributor advertising funds.

Other appellees attack this statement, but ignore the evidence therein referred to which shows that Hale was a selling arm or agent of the vendors involved. The evidence of this favored treatment is direct evidence, and should not have been ignored by the trial Court:

As to G.E., see Pl. Ex. Nos. 708, 712, 713, 714, 715, 717. Pl. Ex. for Id. No. 1184, shows on its face a special advertising fund established between G.E. and Hale.

As to Maytag, see Pl. Ex. Nos. 1034, 1035, 1081, 1059, 1061, 1062.

As to Borg-Warner, see Pl. Ex. Nos. 4101, 4102, 4099, 4055, 4089.

As to Hotpoint, see Pl. Ex. Nos. 28, 1094-1107, 4387, 4388, 4390. See also Tr. 3229, 3233.

As to R.C.A., see Pl. Ex. Nos. 574, 575.

As to Whirlpool, see Pl. Ex. Nos. 685, 686, 687, 688, 680, 681, 4236.

Appellees seem to argue that the burden of proving that the special programs in existence between them and Hale, Macy's, Lachman Bros., Redlick's and Sterling were *not* discriminatory was with the appellants. However, this ignores the evidence which properly speaks for itself. By that evidence, appellants established the existence of special programs and special funds earmarked for one or a few of these retailers. The documents on their face show a discriminatory plan or program. They were conspiratorial, involving each party in an unlawful undertaking. Appellants, if granted a new trial, would be entitled to an instruction that a *prima facie* case of discrimination is found when a special sale or a special program is given to one or a few retail accounts and that no justification exists for such special programs. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 694 (1967); *F.T.C. v. Fred Meyer, Inc.*, 88 S. Ct. 904 (1968).

**13. Direct co-conspirator retailer action to foreclose appellants' newspaper advertising**

Just prior to the filing of appellants' first complaint in August, 1960, a representative of co-conspirator Sterling (Schreck) arranged a meeting with an officer of the San Francisco *News Call Bulletin* to protest U.S.E. advertising (Ap. O.B., p. 70). Lachman Bros. refused to advertise in the *News Call Bulletin* because it allowed U.S.E. to advertise (Tr. 2305-2309). Hale had limited its advertising in this paper in 1959 (Pl. Ex. No. 4343; Tr. 331-333).

This evidence is ignored by appellees.

**Conclusion:**

Under settled principles applicable to motions for a direct verdict, the above statements are assumed true, and the arguments and contrary factual propositions advanced by the appellees create issues of fact to be determined by the jury under the Seventh Amendment. The trial Court clearly erred in granting a directed verdict on this record.

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**II. THE SPECIAL DEFENSES OF THE APPELLEES  
ARE UNMERITORIOUS**

- A. A Notice of Appeal is to be liberally construed to effectuate the intent of the parties, when no prejudice is shown**
  - 1. The Court has jurisdiction over Norge Sales Corporation**

Norge Sales argues that this Court has no jurisdiction over it, because the Notice of Appeal did not specifically designate an appeal from the judgment in summary judgment in favor of Norge Sales (R. 165-166). (B.W. Br., pp. 3-5). But it was clearly the intent of appellants to appeal from the Order dismissing Norge Sales, as shown by Item IV of Appellants' Statement of Points On Appeal and Designation of the Record (R. 2291). See *Foman v. Davis*, 371 U.S. 178, 225 (1962), *Gajewski v. Stevens*, 346 F.2d 1000, 1001-1002 (8th Cir. 1965); *Holz v. Smullen*, 277 F.2d 58, 60-61 (7th Cir. 1960); *Poe v. Glad-den*, 287 F.2d 249, 250 (9th Cir. 1961); *Blitzstein v. Ford Motor Co.*, 288 F.2d 738, 740 (5th Cir. 1961). Notices of appeal are to be liberally interpreted to give effect to the intent of the parties unless prejudice is shown. See *Ginsburg v. Ginsburg*, 276 F.2d 94,

95-96 (9th Cir. 1960); citing 28 U.S.C. § 2111. Costs were assessed against appellants in favor of appellee Norge Sales by the trial Court in the Judgment on Directed Verdict and Order Dismissing Complaints (R. 1979), not earlier. There is no prejudice to Norge Sales; its attorneys represented Borg-Warner, and Norge Sales did not deem the order in summary judgment sufficiently final to present a cost bill, but waited until the judgment on directed verdicts was entered.

**B. Maytag West Coast is in error in urging that appellants may not show its knowledge of the conspiracy and reasons for joining it even though they occurred prior to the time of the refusal to deal**

The Supreme Court in *Continental Ore Corporation v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 709-710 (1962) made it clear that the relevancy of evidence offered to prove knowledge and participation in a conspiracy to violate the anti-trust laws does not depend on the date that the complaining party is injured by the particular conspirator. This Circuit has also so ruled. *Esco Corporation v. United States*, 340 F.2d 1000, 1005-1006 (9th Cir. 1965). The injured claimant must be allowed to show the conspirator's knowledge of the conspiracy at the time of joinder and his participation. *Dextone Co. v. Building Trades Council*, 60 F.2d 47, 48-49 (2nd Cir. 1932). If the law were otherwise, a claimant could never show that a defendant joined the conspiracy when the reasons given for its joinder, as here, occurred prior to the date of the refusal to deal. See *Standard Oil Co. of California v. Moore*, *supra*, at p. 209, n. 21; *Flintkote Company v. Lysfjord*, 246 F.2d 368, 377-379 (9th Cir.

1957). Clearly the trial Court's rulings excluding Maytag's statements to Mr. B. Freeman just prior to its termination of Manfree's franchise were in error.

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### III. THE TRIAL COURT ERRED IN THE EXCLUSION OF EVIDENCE<sup>11</sup>

#### A. Mr. Valenson's admissions to Mr. Freeman were admissions against interest, and admissible against California Electric

California Electric argues that Mr. Freeman's testimony concerning the telephone call with Mr. Valenson is not admissible, because Mr. Valenson's authority to speak for appellee was not established (Cal. El. Br. pp. 19-22). But, appellants abundantly demonstrated the fact of authority and agency. Mr. Valenson's authority and position as a directing official was established by Mr. Rising (Tr. 3692; 3739-3740, 3751, 3753-3755). He was appellees' sales manager. Pl. Ex. Nos. 665, 1847-1898 proved that he arranged special advertising promotions with Hale. Thus, citation to *Flintkote Company v. Lysfjord*, 246 F.2d 368 (9th Cir. 1957), does not aid appellees. This Court ruled in *Flintkote* that the testimony of what Mr. Baymiller told plaintiffs was admissible, since he was an executive officer of his company. Declarant Ragland's title was assistant sales manager of defendant Flintkote Co. Here Mr. Valenson was California Electric's sales

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<sup>11</sup>Appellants will refer herein to only certain of the errors in the exclusion of evidence and do not discuss all errors alleged in the Specifications of Errors and in their Opening Brief.

manager, one step up the ladder, and on par with Mr. Thompson in the *Flintkote* case. The Valenson statements should have been admitted as admissions against California Electric, independently of whether or not it was admissible as the statement of a conspirator against other conspirators. *Flintkote, supra*, at p. 386; *United States v. E. I. DuPont de Nemours & Co.*, 107 F.Supp. 324, 325 (D. Del. 1952). California Electric has admitted its participation in a conspiracy to injure appellants and to suppress evidence. Yet under the Court's ruling appellants are now liable to California Electric Supply Co. for costs of suit.

**B. Borg-Warner Exhibit 9024 was placed in evidence by that defendant and it should not have been stricken**

It is clear that Borg-Warner counsel is now seeking to raise inadvertance on trial counsel's part in connection with Borg-Warner's offer of the evidence. (B.W. Br., pp. 57-58). Yet appellees insist on calling for the strict application of pretrial statements and stipulations given by counsel for appellants. Here counsel for Borg-Warner asked for admittance into evidence the above exhibit, which was allowed. Having been admitted, it became part of the evidence of this case and should not have been stricken. The motion to strike the *exhibit* was made by (at least on behalf of) counsel for Borg-Warner. Tr. 6628-6629. Appellees' citation of authority (B.W. Br., p. 59) does not deal with the situation at hand: A party moving admission of evidence cannot at a later time in the trial change its mind and have that evidence stricken (See Ap. O.B., pp. 140-141).

C. The Court prejudicially excluded documents pertaining to N.E.M.A. and A.H.L.M.A. exhibits (See B.W. Br., pp. 57-68)

These exhibits are categorized as:

- (1) Pl. Exs. for Id. Nos. 431 and 3022;
- (2) A.H.L.M.A. documents from the files of Norge Sales: Pl. Exs. for Id. Nos. 3006, 3007, 3024, 3026, 3029, 3030, 3034, 3036, 3037;
- (3) Documents from the files of N.E.M.A.

Borg-Warner and other appellees argue that no foundation was established for the introduction of these exhibits.

(1) Pl. Ex. for Id. No. 431 was stipulated by counsel for Borg-Warner (from whose files the document came) to have been duly executed (Tr. 6619). With respect to Pl. Ex. for Id. No. 3022, it was stipulated that the communication was received at the office of Mr. Bull, Vice President of Norge Sales (Tr. 6621). See *Esco Corporation v. United States*, 340 F.2d 1000, 1009-1013 (9th Cir. 1965) [as to Exhibit No. 110 in that case.]

(2) With respect to the A.H.L.M.A. documents, they were admitted to have come from the files of Norge Sales Corporation and are authentic (Tr. 3315). *Esco Corporation, loc. cit. supra.*

(3) The N.E.M.A. exhibits were shown to have been produced by the Secretary of the Consumer Products Division of that Association, Mr. R. D. Smith (Tr. 6453). His deposition was marked for identification by the Court (Tr. 6462, 6466-6467).

Appellants established a *prima facie* showing of authenticity of these exhibits under the rule set forth in *Esco Corporation v. United States*, 340 F.2d 1000 (9th Cir. 1965), at page 1013, as follows:

"The question of its authenticity was one for the jury, subject always to the sound judicial discretion of the trial judge. The rule is aptly expressed by Judge Merrill of this court in his Carbo decision, *supra*."

It does not behoove appellees to argue the authenticity of documents which are known to be genuine and authentic. The relevancy of these documents has been discussed (Ap. O.B., pp. 164-165). Indeed, Whirlpool concedes the relevancy of such documents under *American Tobacco Co. v. United States*, 147 F.2d 93 (6th Cir. 1944). (W.P. Br., p. 34).

In discussing the foundation for the introduction of these exhibits, this Court's decision in *Standard Oil Co. of California v. Moore*, *supra* is mentioned by appellees as though the trial Court did not include relevancy in its ruling as to "foundation". Appellants submit that the trial Court's foundation rulings did include relevancy findings; since a *prima facie* case of authenticity had been established. As such, *Moore* is unquestioned authority for the admissibility of evidence showing that the manufacturer appellees (who deal closely with the retailer co-conspirators as their local advertising agents), also worked closely together and controlled the major appliances industry as a supra-governmental agency. This is a relevant circumstance in proof of conspiracy.

**D. Pl. Ex. for Id. No. 4028 established the contrary to Borg-Warner's contention that the boycott of U.S.E. was not discussed at the Villa Hotel meeting**

Borg-Warner and Norge Sales claim (B.W. Br., p. 45) that Graybar requested the meeting at the Villa Hotel. This document expressly shows that it was important *for Norge Sales* that Bull, Bonnet and Lancaster discuss the transhipping of Norge appliances at this conference, and that it was Norge Sales that wanted the meeting.

**E. G.E.'s own documents show that retailers in San Francisco did not engage in retail price competition**

G.E. disclaims attempts to control retail prices in the local market, or that it engaged in a coercive price control program (G.E. Br., pp. 10-13). Yet, Pl. Ex. for Id. No. 5033 admits that retail price uniformity exists under G.E.'s support and approval. Pl. Ex. for Id. Nos. 5032, 5034 and 5044 all directly show that G.E.'s decision whether to franchise discount stores had to be based on considerations of whether to continue a controlled market. They show the G.E. policy of not selling to discount stores. In support of the trial Court's ruling, G.E. asserts their confidentiality as intra-office reports, cumulativeness, and lack of foundation (G.E. Br., pp. 41-42). But the documents were not inadmissible because of their "confidentiality", and they were not cumulative, being direct evidence of admissions of lack of price competition among G.E. dealers. They are admittedly from the files of G.E., thus issue of "authenticity" should have been submitted to the jury. *Esco Corporation v. United States*, 340 F.2d 1000, 1012 (9th Cir. 1965).

Pl. Ex. for Id. Nos. 5045-5047 established what is denied by appellees: the brands carried by discount stores were a matter of concern to the appellees, and studies were made as to what competitors were selling them.

**F. The exclusions of the testimony of Vern Brown and Pl. Exs. for Id. Nos. 5112 and 5113 were an abuse of pre-trial rules**

The fundamental purpose of litigation is to ascertain the truth. Pre-trial procedures should not be used to prevent the admission into evidence of highly probative evidence. The testimony of Mr. Brown and these exhibits discredit the defense of Hotpoint, and prove the existence of a conspiracy to refuse to deal with discount stores in San Francisco County. Clearly the Pre-Trial Conference Order should have been amended, to permit substantial justice. *Simpson Timber Co. v. Palmberg Const. Co.*, 377 F.2d 380 (9th Cir. 1967); *Washington State Bowling Prop. Ass'n v. Pacific Lanes*, 356 F.2d 371 (9th Cir. 1966); *Globe Indemnity Co. v. Capital Ins. & Sur. Co.*, 352 F.2d 236 (9th Cir. 1965). In the last case, this Court stated, at p. 239:

“Pre-trial orders can be and generally are valuable aids to a just determination of litigation. But occasionally strict adherence to them will produce an opposite result. (See Rule 16). Granted, a pre-trial order should not lightly be modified, nevertheless a court should be liberal in allowing amendments where no substantial injury will be done the opposing party, *the failure to allow the amendment might result in a grave injustice to the moving party*, and the inconven-

ience to the court is relatively slight.” (Emphasis added.)

Here Mr. Brown was not even an “undisclosed” witness, since he was listed in “Plaintiffs Separate Listing of Documents Pursuant to Local Court Rule Para 4(10) Showing Nature and Relevance of Documents and Witnesses”. (R. 1533).

**G. The trial court erred in excluding evidence offered against R.C.A.**

(1) Ex. for Id. No. 1691 (R.C.A. Br., p. 24, n. 11):

Mr. Bernard Freeman testified in substance that he saw this particular letter after it was prepared (written) and signed, and that he put it into an envelope and gave it to “one of the girls to mail” (Tr. 5984). (Tr. 5980-5984). As evidence of the sender’s practice of mailing correspondence, together with the well-established presumption that a letter correctly addressed and mailed is presumed to have been received (Calif. Ev. Code §641 [former Calif. Code of Civ. Proc. §1963(24)]; 1 *Wigmore on Evidence* §95 (1st Ed.)), this was sufficient foundation. *Hughes v. Pacific Wharf etc. Co.*, 188 Cal. 210, 219-224 (1922). *Wagner Tractor, Inc. v. Shields*, 381 F.2d 441 (9th Cir. 1967), cited by R.C.A. (R.C.A. Br., p. 24, n. 11) is not inapposite: There the sender was not determined, and there was apparently no recipient’s address on the telegram (381 F.2d at p. 446).

R.C.A. denied receipt (which is simple to do). The jury should decide whether they believed the letter was probably received, as there was sufficient foun-

dation for its admission. The relevancy of Manfree's letter requested product consistently denied to it from a major television manufacturer, is obvious. *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 201 (9th Cir. 1957).

(2) Exs. for Id. Nos. 343, 344 (R.C.A. Br., pp. 26-27):

Foundation for these exhibits, each originated by R.C.A. (R.C.A. Br., p. 27), comes from the pre-trial position of appellee's counsel (R. 1533) that no objections of lack of foundation would be made as to "correspondence emanating from R.C.A." R.C.A. now apparently contends this excludes *intra-company* memoranda as not *emanating* from R.C.A.! (R.C.A. Br., p. 27). There is no dispute that these exhibits came from R.C.A.'s files; thus they clearly were authenticated (Calif. Ev. Code §1414).

Analysis of Pl. Ex. for Id. Nos. 343 and 344 shows the extreme prejudice to appellants in the rejection of such evidence: these documents are clear proof that R.C.A. was the active instigator, and the principal involved in maintaining R.C.A.'s list prices as the advertised and tagged retail prices in the San Francisco market. Exhibit No. 343 is direct evidence of a conversation between R.C.A.'s vice-president in charge of its Western Division, Mr. H. R. Maag (Tr. 4668-4669), and its Director of Regional Operations in 1957, R. W. Saxon (Tr. 4530-4532), concerning the suggestion of Meyer (then Leo J. Meyberg Co.), to raise list prices on certain television sets, while maintaining the existing dealer net price.

Exhibit No. 343 identifies models as to which Meyer requested R.C.A. for an increase in manufacturer's list price. Comparison of Pl. Ex. No. 1947 G. H. (R.C.A.'s price list), with Pl. Ex. No. 1948 (Meyer's price list), shows that Meyer was submitted the precise R.C.A. list price on these models to its retailers in San Francisco. This is convincing additional proof that Meyer was *not* free to set "suggested" list prices as it desired, but pursuant to a common understanding with R.C.A. was compelled to discuss list price change requests with R.C.A. Also, the fact that Pl. Ex. for Id. No. 343 includes an attachment of appellee General Electric Company's dealers' list prices is further proof that R.C.A. received direct knowledge of the retail price advertising policies of A. H. Meyer Co.

Pl. Ex. for Id. No. 344 is a memorandum of September, 1958, from Mr. Wallace of R.C.A.'s regional office to Mr. Peterson of R.C.A.'s office in Camden, New Jersey, forwarding a Meyer price sheet containing "suggested" retail prices. Why should R.C.A. officials exchange such information if it was of absolutely no concern to R.C.A. what suggested list prices were promulgated by its distributor to retailers?

(3) Ex. for Id. No. 348 (R.C.A. Br., pp. 27-28):

That R.C.A. is properly chargeable for knowing participation in an advertising program coercively operated in the local market to maintain retail prices is further demonstrated by Pl. Ex. for Id. No. 348, also prejudicially excluded from evidence. This exhibit is a letter from P. L. Henry, vice-president of

Meyer, to Mr. Wallace of R.C.A. (with carbon copies noted to Mr. Don Gentile, R.C.A. sales representative for the San Francisco area, and Mr. J. T. Bannon, of R.C.A.'s Camden office), stating in part: "In some instances we do allow cut pricing and others we don't". This is evidence of appellee's knowledge that its distributor is controlling retail prices, after title to the goods has passed to the R.C.A. dealer; and from such evidence (in conjunction with all other evidence [*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962)]) the jury could further conclude that R.C.A. participated with Meyer in the price maintenance program, in violation of the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 155, 161 (1948); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Albrecht v. The Herald Co.*, 19 L.Ed. 2d 998, 1002 (1968).

Those in charge of the distribution of great sums of advertising money are chargeable with the manner in which such funds are utilized; as has been expressly recognized in enforcement of the Robinson-Patman Act. See *Federal Trade Commission v. Fred Meyer, Inc.*, 88 S. Ct. 904 (1968).

R.C.A.'s counsel stipulated this letter is authentic, and was received by Mr. Wallace of R.C.A. (Tr. 4603).

(4) Ex. Nos. 5060, 5061, and 5070 (R.C.A. Br., pp. 28-29):

R.C.A. identifies these exhibits as "correspondence from R.C.A." (R.C.A. Br., p. 28) and concedes their

authenticity, apparently only arguing that they are irrelevant, under R.C.A.'s construction of the contents.

However, a reading of these exhibits, in the context of the other evidence, demonstrates how R.C.A. controlled the expenditure of its advertising funds by its distributors to retailers, and the way in which retail prices were to be shown in local advertising.

Pl. Ex. for Id. No. 5061 states in part:

*"Important Merchandising Pricing.* Pricing will be shown on leader merchandise only. Please indicate at the bottom of the dealer listing form in the space provided whether you desire Zone I or Zone II pricing of these Leader Models in your inserts."

This is clearly a direction to R.C.A. distributors as to what models will have pricing disclosed.

Pl. Ex. for Id. No. 5070 shows that advance approvals from R.C.A. were necessary for participation in the advertising subsidy program discussed in the exhibit. 5070 A-C expressly states:

*"... Your cooperation is necessary in obtaining advance approvals, rapidly preparing and submitting claims, and sending in Balance Statements (TRS 225) on time. With your cooperation, we will be able to have claims processed and credits issued in a minimum time."* [Emphasis added.]

Pl. Ex. for Id. No. 5060 discloses that R.C.A. unilaterally determined the manner in which its retailer advertising subsidy programs were going to be administered.

## (5) Ex. for Id. No. 5068 (R.C.A. Br., p. 30):

The *affidavit* to be signed by the retailer does not contain any references to F.T.C. guides; but to the contrary *requires* the retailer to state its prior retail prices or prevailing (retail) prices. The granting of advertising allowances is based on the receipt of such affidavits. The explanation that this mandatory requirement was solely designed to further supposed F.T.C.-approved policies is apparently R.C.A.'s theory of defense. The jury could just as well draw other conclusions, including a finding that the appellees were usurping governmental authority for their own purposes.

## (6) Ex. for Id. No. 1702 (R.C.A. Br., p. 32):

This letter was written by R.C.A. Victor Distributing Corporation in Los Angeles, in response to a request to it from Manfree for product. The meaning of its phrase "we concentrate our sales efforts in the market areas where we are best facilitated to serve which are in Southern California" is a factual question. The letter also states "we have no customers in your market area". Vertical territorial restrictions cannot lawfully support a local boycott. *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196, 200 (9th Cir. 1963). Such vertical restraints are illegal *per se*. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 378-379 (1967).

## (7) Ex. for Id. Nos. 780 and 1159 (R.C.A. Br., p. 33):

In quoting from a portion of Pl. Ex. for Id. No. 780, R.C.A. studiously avoids the paragraph which

was a basis for its offer into evidence (Tr. 4649) :

“... Since they are recognized as key accounts, we are asking you to make an exception in this case and accept these violations.”

With knowledge that Meyer deemed Hale and R. H. Macy Co. to be “key” retail accounts in the market, R.C.A. approved the advertising subsidy claims for these retailers, *despite* “violations” of F.T.C. guidelines. Pl. Ex. for Id. No. 1159.

(8) Ex. for Id. Nos. 363, 364 and 365 (R.C.A. Br., p. 34) :

It is appellants’ contention (Ap. O.B., pp. 64-65, 69-71) that San Francisco Better Business Bureau’s Home Furniture Advisory Committee meetings were used as a forum by co-conspirator retailer representatives to discuss discount store competition and newspaper advertising, resulting in Mr. Schreck of co-conspirator Sterling Furniture Co. seeking to have the San Francisco *News Call-Bulletin* reject U.S.E.’s advertising. These exhibits are thus relevant to R.C.A.’s defense that it had no concern with, or knowledge of, such activities in the local market.

(9) Evidence Pertaining to Policing of Spiegel Outlet Store Situation

These exhibits and testimony (R.C.A. Br., pp. 35-36) show that R.C.A. was clearly on notice that the major San Francisco retailers expected list prices to be maintained, and its continued business arrangements with Meyer points to appellee’s acquiescence in such a plan. They also demonstrate the obvious

belief of Meyer that local market problems were to be brought to the attention of and discussed with R.C.A.; and that Meyer refused R.C.A.-brand televisions to Spiegel, another "price-cutter", as it did to Manfree, and undoubtedly for the same reasons with the knowledge and consent of R.C.A.

**H. The trial court erred in excluding evidence against Whirlpool**

(1) Pl. Ex. for Id. 5086 (W.P. Br., p. 28) :

The contention that R.C.A. and Whirlpool did not have anything to do with the administration or policies of the other is unbelievable when it is shown that two directors of R.C.A. were on the Board of Directors of Whirlpool. This is proof of joint control over administration and policies.

(2) Pl. Ex. for Id. 1714 (W.P. Br., p. 28) :

From this exhibit the jury could conclude there had been discussions between Whirlpool and Meyer concerning Manfree. This exhibit went directly to the issue of whether or not there was discussion and approval of Meyer selling to discount stores.

(3) Pl. Ex. for Id. 5077 (W.P. Br., p. 29) :

It was prejudicial error for the court to exclude from consideration documents showing the existence of Whirlpool's dealer call reports, and the subject matters discussed between Whirlpool and Meyer about the local retail market.

**I. Evidence that Frigidaire maintained suggested list prices after 1960 was improperly rejected**

Frigidaire claims that Pl. Ex. for Id. Nos. 4170 and 4178 (A-C), 4178 were not properly admissible (Frig. Br., pp. 42-44). It attempts to make the identification of the author of the handwritten notes material. But Ex. No. 1470 was admittedly from the files of Lachman Bros. (Tr. 1895-1896), and it was stipulated that Pl. Ex. No. 1478 was from Redlick's records (Tr. 2267). The offer of those exhibits was on the ground that substantially the same list prices were followed, allowing the conclusion that there were discussions with Frigidaire personnel as to "list" price, a term used by a supplier. It was established that retail prices were discussed between Mr. Laird of Lachman Bros. and Mr. Shaw of Frigidaire (Tr. 1896-1897, 1902; see impeachment of Laird's testimony at Tr. 1905-1910). Whether or not Frigidaire continued to promote sales at its suggested list price was in issue, and it was a question for the jury.

**J. The deposition of Arthur Alpine was erroneously excluded**

The record is clear that appellees' counsel had full and complete examination of Mr. Alpine on all subject matters upon which they desired to interrogate, with the exception of claimed privileged material (R. 254-261). It was counsel for appellees who delayed an unreasonably long time in raising the issue of claimed privileged material. The deposition of Mr. Alpine should not have been excluded.

#### IV. THE TRIAL COURT ERRED IN ITS PRETRIAL DISCOVERY RULINGS

##### A. The trial court erred in not enforcing the subpoena duces tecum against Frigidaire Sales Corporation

The Frig. Br. incorrectly claims that Frigidaire agreed to comply with substantially all the items demanded in the subpoena against Frigidaire. This is completely contrary to the showing made by the appellant in moving that the court order the production of documents set forth in the subpoena (R. 309). It is further amazing that Frigidaire should claim that the ruling of Judge Sweigert supports its position as to the failure to produce documents at a deposition since the order of Judge Sweigert (R. 362-368) indicated to the defendants that there should be liberal production of documents in the litigation. Frigidaire thus avoids the issue raised in the Specification of Error, VIII.A. Frigidaire should have been required to respond to a subpoena duces tecum as to relevant and material matters and it is not an answer to say that Frigidaire subsequently produced some documents.

Rule 45 requires the production of documents at a deposition and should be enforced to provide the parties with deposition tools. The plaintiff is entitled to all tools of discovery available to it. Defendant can require showing of good cause by a motion to quash before the deposition or can respond to a motion for compliance with the subpoena. *Fifth and Walnut, Inc. v. Loew's*, 1948 Trade Cases, Para. 62,458 (per J. Rifkind) citing 2 Moore's Fed. Practice § 34.01.

**B. The court erred in denying the plaintiff's motion for an order to show cause why documents should not be produced by defendant R.C.A.**

Appellee RCA conveniently avoids the position it now finds itself in with respect to its refusal to produce documents at the depositions of Mr. Dan Gentile, Mr. Fred Folsom, Mr. Harold Maag and Mr. R. W. Saxon. A subpoena had been served upon Mr. Gentile on March 14, 1963 (R. 327) and the subpoena was addressed to Radio Corporation of America and/or its managing agent Dan J. Gentile. No motion to quash was made with respect to this subpoena and the defendant refused to produce documents at the above depositions (R. 333-334). R.C.A. has risked the ruling of the courts as to whether or not Mr. Gentile was a managing agent. It now ignores this evasion and argues that appellant has established no good cause for production of documents; but R.C.A. was shown to have a considerable amount of correspondence with A. H. Meyer Co. (R. 338). Its field representative, Dan Gentile, was shown to have made reports to his superiors concerning his visits to retail stores (R. 344). These documents have simply never been produced by R.C.A.

**C. The court erred in denying production of documents addressed to the factory defendants, Item 15.**

Whirlpool and General Electric claim that plaintiffs in effect have received the documents requested, referring the court to Items 12, 17-23 of Plaintiffs' Motion for the Production of Documents, dated June 5, 1965; but Item 12 did not refer to inter-office cor-

respondence and Item 18 was limited by the court to documents that directly or indirectly contain or reflect policy, understanding, or agreement on whether or not RCA-Whirlpool appliances should be sold to plaintiffs or any other discount store. As to R.C.A., appellees' briefs clearly show that the court did not grant this order despite the fact that R.C.A. had no objection to the order being granted (R. 425). Defendants Maytag Co., and General Motors Corp., did not file affidavits in opposition to the motion, but merely filed memoranda claiming they did not have such documents. With respect to Borg-Warner see heading F. below.

**D. The Court erred in denying Item 15 of Plaintiff's Motion for the Production of Documents addressed to the distributor defendants.**

California Electric Supply has not responded to this specification of error (Cal. El. Br., 36). Maytag West Coast Co. claims that no such documents exist, but the fact remains that no affidavit was made to support this statement. The same is true with respect to Frigidaire Sales Corporation and General Electric Corporation.

**E. The Court erred in refusing to require appellees General Electric, Whirlpool, and RCA to answer Questions 2, 3, 4, 5 and 6 of Plaintiff's Interrogatories, and in refusing to require said appellees to answer Questions 1, 2, 3 and 6 of Plaintiff's Second Interrogatories.**

These interrogatories were designed to obtain information of the existence of memoranda concerning conversations about appellants. Thus, by the Court's

ruling, appellees were not required to produce the same type of reports which appellants previously were required to produce (R. 270-272). The procedure outlined by Judge Weigel in his earlier Order (Id.) allowed *in camera* inspection of claimed privileged materials of this nature. This procedure was not adopted by Judge Zirpoli, whose orders in effect denied appellants' attempts to obtain appropriate foundation for the production of memoranda of conversations by defendants about the parties to the litigation (R. 791-792; 972). It is respectfully urged that good cause exists when it is shown that discovery was ordered to proceed along defined lines as to certain types of evidence, as to one of the parties. When such a definitive order is made, the other parties should be required to produce the same type of materials.

**F. The Court denied production of documents described under Items 20, 22(c)-(e), and 27(f) of Plaintiff's Motion for the Production of Documents.**

Maytag Corporation, R.C.A. and General Electric do not cite any corporate affidavits in opposition to this motion. Whirlpool claims the plaintiffs received, in substance, the documents requested in Items 22(c) and 22(d) and refer the Court to Items 18 and 19 of appellants' first Motion for the Production of Documents. But this refers the Court to an order which used the terminology "policy, understanding, or agreement." Whirlpool also claims that an order requiring the production of a speech is a sufficient response to Item 27(f). This, of course, cannot be sustained. Likewise, General Electric does not cite its responses to

this Motion for the Production of Documents, and instead refers to affidavits filed in response to an earlier motion. The position of Borg-Warner is that the documents requested were produced pursuant to deposition agreements, but the Court did not order the production of the documents referred to in the above items by Borg-Warner. Borg-Warner took the position that it did not control documents of a 100% subsidiary whose president was under its employ, Mr. Judson Sayre. (See affidavit of R. Murphy, R. 551. Compare R. 551 with Tr. 2474-2532.)

In summary, therefore, the appellants were denied definitive pre-trial orders allowing them production of documents referring to them, memoranda concerning the significant conversations involved in the litigation, and reports made at the request of counsel although defendants had the right to *in camera* inspection of similar documents of appellants. Discovery in this case was not equitable and was prejudicial to the appellants.

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**V. THE TRIAL COURT PERMITTED PREJUDICIAL ERROR IN NOT PERMITTING APPELLANTS TO INTRODUCE EVIDENCE OR OBTAIN JUDGMENT BASED ON DEFENDANT'S ENTRY INTO VERTICAL CONSPIRACIES TO RESTRAIN AND MONOPOLIZE INTERSTATE TRADE AND COMMERCE, AS ALLEGED IN THE COMPLAINT.**

Appellees seem to argue that the court did allow consideration of appellants' contention that they were injured by single horizontal conspiracies in violation of Section 1 or 2 of the Sherman Act. We urge that the Pre-Trial Order limited the case to prevent such

a showing, and certainly the trial court's decision did not view the case as involving separate vertical conspiracies. But appellants were entitled to prove all violations of the antitrust laws. The rule is now certain under the Supreme Court's recent opinion in *Perma Life Mufflers, Inc., et al. v. International Parts Corp.*, ATRR, No. 361, X-15, that a plaintiff is entitled to a judgment based on any violation of the antitrust laws which injure him. (Citing Rule 8(f) Fed. Rules Civ. P.).

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#### VI. ITEMS OF COSTS IMPROPERLY TAXED.

The appellees who discuss the cost judgment (R.C.A. Br., pp. 42-43; W.P. Br., pp. 49-50; Frig. Br., pp. 60-64; Cal. El. Br., p. 36) do not argue against (or even mention) the strong policy statement as to the discretionary allowance of taxable costs in federal cases set forth by the Supreme Court in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964). (See Ap. O.B., p. 178).

*Farmer* points out that proper allowance of costs for copies of daily trial transcripts is strictly based on *necessity, not the convenience of counsel* (379 U.S. 227 at 233-234). While claiming that two complete sets of trial transcripts were "essential" (Frig. Br., p. 62), appellees strangely offer no explanation or reason in fact why two separate sets were so essential. The Supreme Court upheld the District Court's disallowance of *any* costs for daily transcripts, noting that the case was "not . . . complicated" (*Id.* at p.

234). Calling the present matter "complicated" does not open the door to all costs appellees saw fit to incur for their own convenience. As in *Farmer*, there was no need for the jury to read trial transcripts, and appellees had no need for transcripts to draw proposed finding (*ibid.*); their need for transcripts in cross-examination, or to prepare a brief during trial (referring to testimony) was, as shown by the record, very limited. At the most, appellants should be taxed the costs of *one* set. See *Perlman v. Feldman*, 116 F. Supp. 102, 109 (D. Conn. 1953), relied upon in *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 676-679 (9th Cir. 1963).

As to transcripts of the non-evidentiary pretrial court hearings, R.C.A. advances no argument supporting the taxing of costs of such transcripts (R.C.A. Br., p. 42). Frigidaire asserts that such transcripts were necessary for preparation of the Pretrial Order (Frig. Br., p. 63). Yet, an inspection of that Order reveals no reference to pre-trial hearing *transcripts*; the relevant Orders of the trial court following pre-trial hearings were prepared and signed before such transcripts were printed by the reporters. The statement by Judge Hincks in *Perlman v. Feldman*, *supra* (116 F. Supp. 102 at 112) disallowing such costs (Ap. O.B., pp. 180-181), adequately demonstrates why taxing these cost items was an abuse of discretion.

This Court in the *Independent Iron Works, Inc.*, case (*supra*), so strongly relied upon by appellees, notes that costs of depositions taken by defendants (appellees) are properly taxable *only* if necessarily

used at trial (as for impeachment) and not otherwise (322 F.2d 656 at 678). And, in the same opinion, it was noted that costs of depositions taken by plaintiffs (appellants) of officers of adverse parties who may be witnesses were taxable, but not the costs of other depositions taken by appellants (*Id.* at pp. 678-679). And, that decision was made without a transcript of the cost hearing, and before the Supreme Court's definitive policy statement on taxable costs in *Farmer, supra*. Thus, as pointed out by appellants (Ap. O.B., pp. 179-180), taxing costs for deposition transcript copies of other than those listed on page 5 of appellants' Objections to Defendants' Bills of Costs (R. 2042, 2046) was an abuse of discretion, and should be disallowed. In support of taxing such costs, Frigidaire argues that the trial court "adopted correct standards" including costs of copies of depositions for "potential impeachment of witnesses" (Frig. Br., p. 62). Then it cites the *Independent Iron Works* opinion for authority that taxing such costs was proper where the depositions taken by defendants "had been used" for impeachment. (*Ibid.*) [Emphasis added.] Here, as noted, appellees' use of depositions for impeachment was very limited (Ap. O.B., p. 180).

Taxing the costs of reproducing all of appellants' prospective exhibits was also an abuse of discretion, as previously delineated (Ap. O.B., p. 180). All exhibits were lodged in, and remained in court from a time before trial, available to all appellees at any time, contrary to what Frigidaire attempts to imply

(Frig. Br., pp. 63-64). Copies to take back to attorneys' offices would be purely a convenience.

As to the taxation of travel costs for Mr. Saxon of R.C.A. to attend his deposition, including travel outside the District and in excess of 100 miles, R.C.A. contends that the *Farmer* decision expressly authorized such costs (R.C.A. Br., p. 43). It does not. The Supreme Court in *Farmer* leaves the taxing of such costs to the District Court, *but* (consonant with its general expression of policy in that case) states with respect to the 100-mile limitation rule:

“... that rule, we think, is a *proper and necessary consideration* in exercising discretion in this field.” [Emphasis added.] (379 U.S. 227 at 234).

*Moylan v. AMF Overseas Corporation*, 354 F.2d 825 (9th Cir. 1965) cited by R.C.A. (R.C.A. Br., p. 43), involved a witness who was a *party*, who was subpoenaed to testify at trial by appellants, and who expressly was *not* found to have been an “adverse witness” (354 F.2d 825 at 830). Under these circumstances, this Court found taxing of costs of travel for over 100 miles not to be an abuse of discretion. But *Moylan* does not overrule *Kemart Corp v. Printing Arts Research Laboratories, Inc.*, 232 F.2d 897, 904 (9th Cir. 1956), in light of the guidelines expressed in *Farmer* (above), to the effect that in circumstances like that pertaining to Mr. Saxon, taxable costs should be limited to 100 miles or actual mileage traveled in the District up to 100 miles, whichever is greater. It was an abuse of discretion to tax such costs in excess of such limitations.

**CONCLUSION**

It is respectfully submitted that the judgment below as to all appellees should be reversed and this case remanded for trial.

Dated, San Francisco, California,  
June 27, 1968.

Respectfully submitted,  
**MAXWELL KEITH,**  
**EDWIN C. SHIVER,**  
By **MAXWELL KEITH,**  
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*Of Counsel.*

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**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellants' Reply Brief is in full compliance with those rules.

Dated, San Francisco, California,  
June 27, 1968.

**MAXWELL KEITH,**  
*Attorney for Appellants.*

(Appendix A Follows)

## **Appendix A**



## Appendix A

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### ANALYSIS OF MAYTAG EXHIBITS CLAIMED TO SHOW RETAIL PRICE COMPETITION IN MAYTAG PRODUCTS WHERE MODEL NUMBER IS IDENTIFIED IN ADVERTISEMENT

Model No.	Exhibit No.	Retailer	Date	Price
123	DMT 13043	Hales	3/12/59	219.95
123	DMT 13044	Hales	3/19/59	219.95
123	DMT 13045	Hales	3/23/59	219.95
123	DMT 13045A	Hales	3/30/59	219.95
123	DMT 13046	Hales	4/2/59	219.95
123	DMT 13047	Hales	6/11/59	209.95
123	DMT 13049	Hales	8/6/59	209.95
123	DMT 13051	Hales	4/9/59	209.95
126	13039	Cherin's	7/30/59	279.95
126	13092	Young Bros.	7/17/59	277.70
126	13050	Hales	7/9/59	279.95
126	13053	Hales	9/3/59	278.00
126	13054	Hales	9/14/59	278.00



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN,  
CALIFORNIA STATE PRISON AT  
SAN QUENTIN,

Respondent-Appellant,

vs.

DONALD LEE BLABON,

Petitioner-Appellee.

FEB 26 1969

No. 20976

APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	
A. Proceedings in the State Courts	1
B. Proceedings in the Federal Court	3
APPELLANT'S CONTENTION	4
ARGUMENT	4
CONCLUSION	12

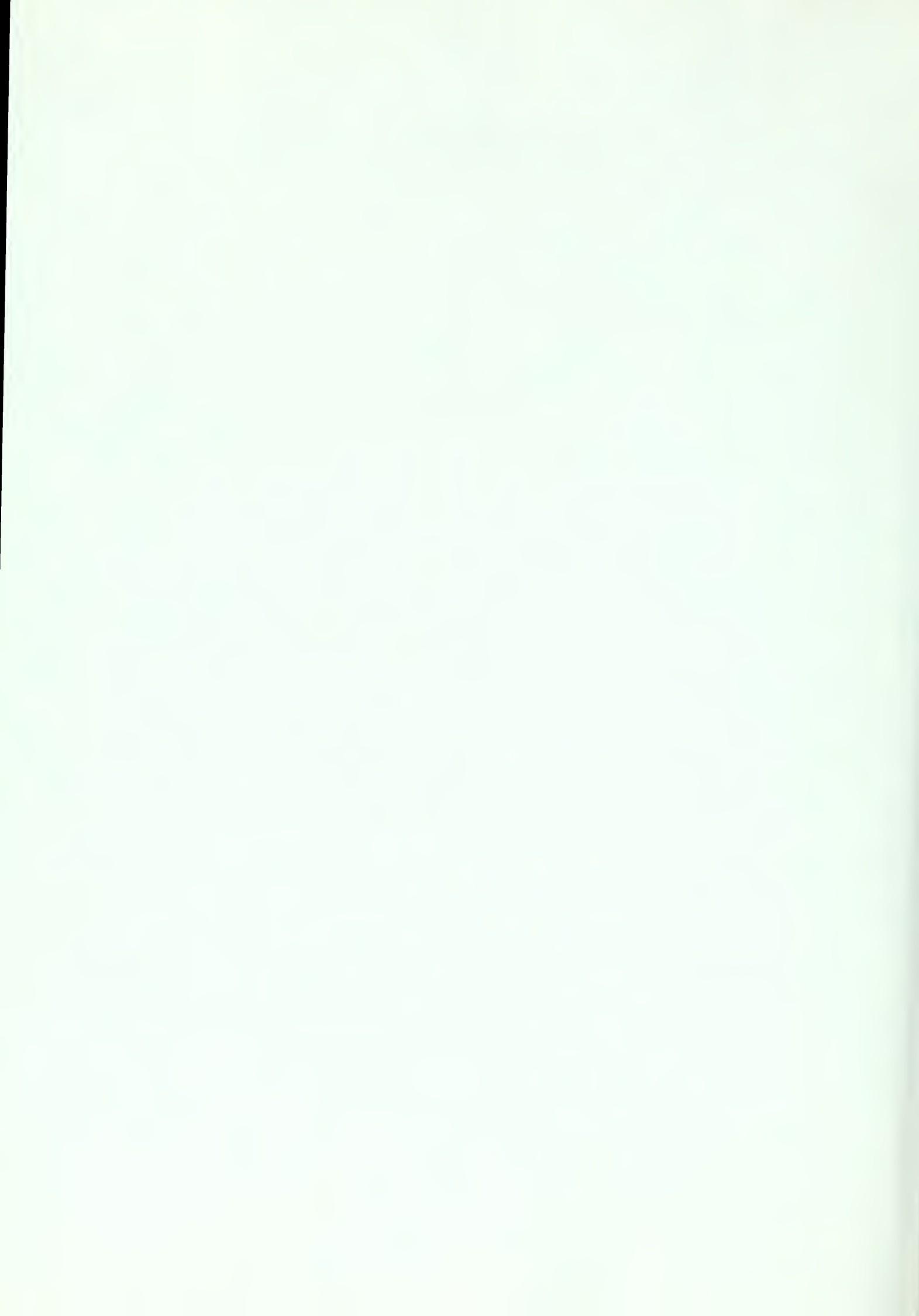


TABLE OF CASES

	<u>Page</u>
<u>In re Keddy</u> 105 Cal.App.2d 215, 233 P.2d 159 (1951)	7
<u>In re Morehead</u> 107 Cal.App.2d 346, 237 P.2d 335 (1950), <u>disapproved on</u> <u>other grounds in Thurmond v.</u> <u>Superior Court, supra</u>	8
<u>In re Stoneham</u> 232 Cal.App.2d 337, 42 Cal.Rptr. 741 (1965)	8
<u>McNally v. Hill</u> 293 U.S. 131 (1934)	5
<u>People v. Alvin</u> 111 Cal.App.2d 800, 245 P.2d 660 (1952)	7
<u>People v. Barzee</u> 213 Cal.App.2d 139, 28 Cal.Rptr. 692 (1963)	9-10
<u>People v. De La Roi</u> 185 Cal.App.2d 469, 8 Cal.Rptr. 260 (1960)	7
<u>People v. Hymes</u> 161 Cal.App.2d 668, 327 P.2d 219 (1958)	6, 11
<u>People v. Wells</u> 112 Cal.App.2d 672, 246 P.2d 1023 (1952)	7
<u>Thurmond v. Superior Court</u> 49 Cal.2d 17, 314 P.2d 6 (1957)	8, 11
<u>Gross v. Superior Court</u> 42 Cal.2d 816, 270 P.2d 1025 (1954)	11



TEXTS, STATUTES & AUTHORITIES

	<u>Page</u>
California Penal Code	
§ 1466, subd. 2(a)	11
§ 1466, subd. 2(c)	11
California Welfare and Institutions Code	
§ 5500	8
§ 5501	7, 9
§ 5503	10
§ 5512.5	10
Annot. 24 A.R.L.2d 350 (1952)	5
20 Am. Jur. Insane Persons	
§ 51 (1960)	5
Rule 2 of the California Rules on Appeal	11



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN,  
CALIFORNIA STATE PRISON AT  
SAN QUENTIN,

Respondent-Appellant,

No. 20976

vs.

DONALD LEE BLABON,

Petitioner-Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of this Court is conferred by Title 28 United States Code section 2253 which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

The proceedings in the State court as relevant to this appeal are set forth in the order of the District Court as follows:

"On November 7, 1960 a criminal complaint was filed in the Justice Court of the Corning Judicial District of California, charging



petitioner with having violated California Penal Code section 311.1 (indecent exposure). He was arraigned on the same day, and the minutes of the Justice Court state that:

"'Complaint filed. Defendant in Court, was arraigned, informed of right to counsel, waived counsel, entered a plea of not guilty and requested jury trial. Jury trial set for Nov. 22, 1960....' (Ex. B attached to respondent's return.)

"Petitioner was subsequently convicted of the offense charged after a trial by jury in which he acted as his own defense counsel. Following petitioner's conviction, the Court adjourned the proceedings and certified petitioner to the Superior Court of Tehama County for proceedings pursuant to California Welfare and Institutions Code §§ 5500 et seq. On May 2, 1961 petitioner was adjudged a mentally disordered sex offender and committed to the custody of the Director of the California Department of Mental Hygiene for an indeterminate period by the Superior Court" (CT 64-65).<sup>1/</sup>

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1. As hereinafter used, "CT" refers to the United States District Court Clerk's record on appeal filed in this Court as the transcript of record.



B. Proceedings in the Federal Court

On September 1, 1965, petitioner filed an application for a writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 1). On September 1, 1965, an order to show cause was issued (CT 22) and on September 29, 1965, respondent filed a return to the order to show cause (CT 56). On October 29, 1965, petitioner filed a traverse to respondent's return to the order to show cause (CT 38).

Subsequently, the District Court appointed counsel to represent petitioner and ordered an evidentiary hearing which was conducted before the District Court on December 8, 1965. On January 3, 1966, points and authorities were filed by petitioner's counsel in support of petitioner's application for writ of habeas corpus in accordance with leave granted by the District Court at the evidentiary hearing (CT 51). Supplemental points and authorities in opposition to the petition for writ of habeas corpus were filed by respondent on January 11, 1966, in accordance with leave granted by the District Court at the evidentiary hearing (CT 55).

On March 31, 1966, the order of the District Court discharging petitioner from custody was filed (CT 64). The order provided that its execution was



stayed ten court days to permit respondent to file a notice of appeal if we so desired and that should such notice of appeal be filed, the order was further stayed and that custody of petitioner was not to be disturbed until further order of the court (CT 70).

Respondent's notice of appeal was filed on April 5, 1966 (CT 75). A certificate of probable cause issued by the District Court was filed that same day (CT 74).

#### APPELLANT'S CONTENTION

The District Court erred in holding that it had jurisdiction to examine the validity of petitioner's justice court conviction for indecent exposure since his present confinement in State prison is pursuant to his civil commitment from superior court as a mentally disordered sex offender.

#### ARGUMENT

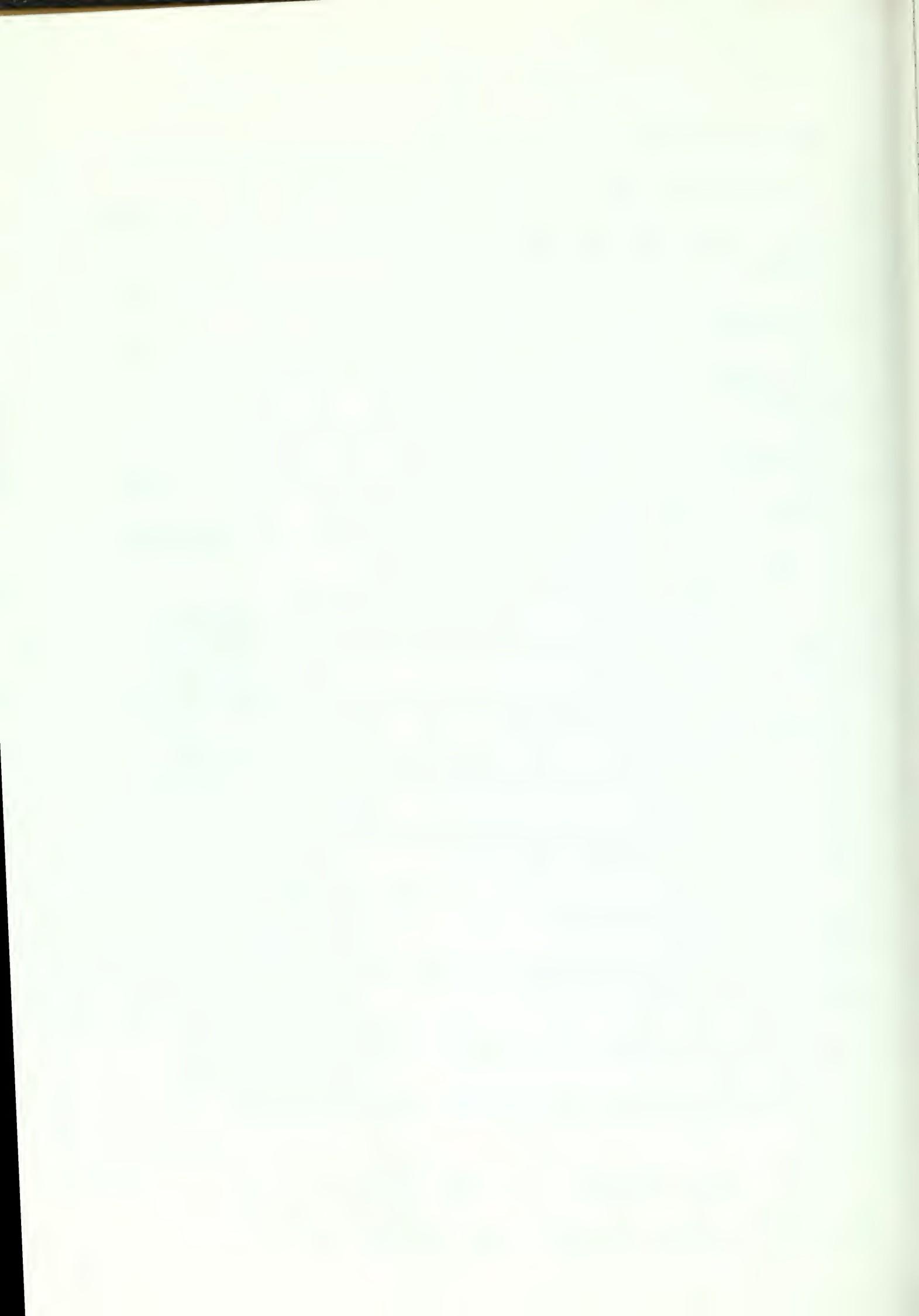
By application for a writ of habeas corpus presented to the District Court, petitioner sought his release from State prison where he is confined under a civil commitment from the State superior court as a mentally disordered sex offender. He sought this relief on the ground that the justice court criminal conviction for indecent exposure which preceded and afforded the jurisdictional basis for his present commit-



ment is invalid since it was secured at a time when he was denied his constitutional right to the assistance of counsel. In our return to the order to show cause issued by the District Court, we took the position that petitioner had presented no federal question since his confinement as a mentally disordered sex offender is based solely upon a judicial determination had in a collateral civil proceeding and is not pursuant to his presently suspended criminal conviction. Cf. McNally v. Hill, 293 U.S. 131 (1934).

The District Court resolved this jurisdictional question by concluding that a valid criminal conviction is a jurisdictional prerequisite to commitment as a mentally disordered sex offender and that if the criminal conviction is subsequently invalidated, the commitment as a mentally disordered sex offender must also fall (CT 65-68). Recognizing that there is no federal constitutional requirement that the underlying criminal conviction be free of reversible error, see generally Annot. 24 A.R.L.2d 350 (1952); 20 Am. Jur. Insane Persons § 51 (1960), the District Court below imposed such a requirement as a matter of state law.

This is clear from the court's conclusion that "as a matter of state law a valid criminal conviction



is a jurisdictional prerequisite to commitment as a "mentally disordered sex offender" and from its holding that if "the criminal conviction is unlawful, then the superior court order (committing petitioner as a mentally disordered sex offender) is no longer a valid basis for continued custody, since it was entered without jurisdiction" (CT 68). In effect then, the District Court held that if the criminal conviction which afforded the jurisdictional basis for the commitment proceeding was subsequently set aside, this had the effect of voiding ab initio the commitment proceeding itself. We submit that by so holding the District Court misinterpreted applicable state law.<sup>2/</sup>

Under California law, proceedings for the commitment of a person as a mentally disordered sex offender are civil in nature and are collateral to the criminal proceeding. People v. Hymes, 161 Cal.App.2d 668, 673, 327 P.2d 219 (1958). A person committed and confined as a mentally disordered sex offender is not confined for the commission of a criminal offense, but rather because it has been judicially determined that

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2. Although we do not present the issue here, we do not concede that the due process clause of the federal Constitution imposes upon the states a blanket requirement that counsel be appointed for indigent defendants in all misdemeanor prosecutions.



he is a mentally disordered sex offender. In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159 (1951). He is confined pursuant to a law whose primary purpose is to protect society against the activities of sexual perverts, People v. Wells, 112 Cal.App.2d 672, 674, 246 P.2d 1023 (1952), and to sequester such unfortunates away from society so long as they constitute a menace to its health or safety. People v. Alvin, 111 Cal.App.2d 800, 804-05, 245 P.2d 660 (1952).

While the person is under commitment as a mentally disordered sex offender, the criminal proceeding against him is suspended and the trial court is precluded from imposing any punishment on the criminal conviction. It is only when the proceedings relating to his commitment as a mentally disordered sex offender have run their course, that the criminal proceedings may be resumed and sentence imposed. People v. De La Roi, 185 Cal.App.2d 469, 472, 8 Cal.Rptr. 260 (1960).

A proceeding for commitment of a person as a mentally disordered sex offender may be initiated immediately following a conviction and is initiated by adjourning the criminal proceeding and certifying the convicted person for examination on the issue of whether he is in fact a mentally disordered sex offender. Cal. Welf. & Inst. Code § 5501. The only requirement is



that there be a conviction and there is no requirement that the conviction shall have become final. See Thurmond v. Superior Court, 49 Cal.2d 17, 20, 314 P.2d 6 (1957); In re Morehead, 107 Cal.App.2d 346, 350, 237 P.2d 335 (1950), disapproved on other grounds in Thurmond v. Superior Court, supra. For this very reason there can be no requirement that the conviction be free of reversible error.

The issue which is resolved in a proceeding for the commitment of a person as a mentally disordered sex offender is whether he is one who "by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others." Cal. Welf. & Inst. Code § 5500. Insofar as petitioner's commitment as a mentally disordered sex offender is concerned, the real significance of his justice court criminal conviction for indecent exposure is that it served to bring him within the class of persons against whom commitment proceedings could be initiated. See In re Stoneham, 232 Cal.App.2d 337, 340-41, 42 Cal.Rptr. 741 (1965).

It is, of course, true that but for petitioner's misdemeanor conviction for indecent exposure, the superior court would have lacked jurisdiction to proceed with his commitment as a mentally disordered sex offender. This



is not to say, however, that the validity of his superior court commitment as a mentally disordered sex offender hinges upon the continued validity of the misdemeanor conviction for indecent exposure. Petitioner stood convicted of a criminal offense as that term is used in section 5501 of the California Welfare and Institutions Code as of the time the jury returned its verdict finding him guilty of indecent exposure. That criminal conviction was existing and presumptively valid when the civil commitment proceeding occurred and it afforded the jurisdictional basis for that proceeding.

We submit that the validity of a superior court order committing a person as a mentally disordered sex offender was never intended under state law to be dependent upon the continued validity of the criminal conviction which afforded its jurisdictional basis. In addition to those matters discussed above, this conclusion also draws persuasive support from a consideration of the procedural protections which are available to a person in such a commitment proceeding. For example, the statutes setting forth the procedures to be followed at commitment proceedings concerning alleged mentally disordered sex offenders are carefully drafted to insure for them those procedural protections considered essential to due process. See People v. Barzee,



213 Cal.App.2d 139, 141, 28 Cal.Rptr. 692 (1963).

It is apparent from the commitment order marked "Exhibit A" and attached to our return to the District Court's order to show cause (CT 33-34) that petitioner was afforded in full measure those procedural protections. The question of whether he was a mentally disordered sex offender was passed upon preliminarily at a hearing conducted by the superior court. Petitioner then underwent an observational commitment at a state hospital after which he was returned to the superior court which after a second hearing again concluded that he was a mentally disordered sex offender. Finally, pursuant to the provisions of section 5512.5 of the California Welfare and Institutions Code, petitioner was afforded a jury trial on the issue of whether he was a mentally disordered sex offender. The commitment order reflects that petitioner was represented by counsel. See Cal.Welf. & Inst. Code § 5503.

Additionally, petitioner had available under state law appellate remedies for the independent review of both the superior court order committing him as a mentally disordered sex offender and of the justice court criminal conviction. Even though the criminal proceeding had been suspended, he could have secured an immediate appellate review of that misdemeanor conviction by moving



for a new trial and, if that motion was denied, by taking an appeal from the order denying that motion. Cal. Pen. Code § 1466, subd. 2(c); see Thurmond v. Superior Court, supra.

Petitioner could have secured an appellate review of the order by the superior court committing him as a mentally disordered sex offender since such an order is appealable as a final judgment in a special proceeding. Gross v. Superior Court, 42 Cal.2d 816, 270 P.2d 1025 (1954); People v. Hymes, supra. Since deemed a civil proceeding, Rule 2 of the California Rules on Appeal would have permitted the filing of such a notice of appeal at any time within 60 days from the date of entry of the order.

Furthermore, if at the conclusion of petitioner's civil commitment as a mentally disordered sex offender some penalty is imposed pursuant to his criminal conviction, he may at that time challenge that conviction. Indeed, if a sentence is imposed upon that conviction, petitioner will be in a position to prosecute an appeal in the state courts. Cal. Pen. Code § 1466, subd. 2(a).

We submit that the District Court below misinterpreted state law when it held that the validity of the superior court order committing petitioner as a mentally disordered sex offender depended upon the



continued validity of the justice court criminal conviction. This error, of course, led the District Court to the erroneous conclusion that it had jurisdiction to examine the validity of petitioner's justice court conviction for indecent exposure. Since petitioner's present confinement in state prison is pursuant to his commitment as a mentally disordered sex offender and not pursuant to his criminal conviction for indecent exposure, the District Court below lacked jurisdiction and its order must be reversed.

#### CONCLUSION

For the foregoing reasons, appellant respectfully submits that the order granting the writ of habeas corpus entered by the District Court below should be reversed and the proceeding dismissed.

Dated: July 1, 1966

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

July 1, 1966

*Derald E. Granberg*  
DERALD E. GRANBERG  
Deputy Attorney General  
of the State of California



FEB 20 1969

IN THE

United States Court of Appeals  
For the Ninth Circuit

No. 21235

CLAIROL INCORPORATED,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE  
COMMISSION

**PETITIONER'S REPLY BRIEF**

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**FILED**

OCT 31 1969

WM. B. LUCK, CLERK



# I N D E X

	PAGE
I. The Beauty Salon/Distribution versus Consumption Issue .....	1
II. The <i>Meyer</i> Form of Order Issue .....	13
CONCLUSION .....	17

## Table of Authorities

### CASES:

<i>Armour &amp; Co. v. Wantock</i> , 323 U.S. 126 (1944) ..4, 15, 16	
“Atlantic Refining”, <i>Atlantic Refining Co. v. F.T.C.</i> , 381 U.S. 357 (1965) .....	8
“Corn Products”, <i>Corn Products Refining Co. v. F.T.C.</i> , 324 U.S. 726 (1945) .....	3, 5, 12
<i>F.T.C. v. Fred Meyer, Inc. et al.</i> , 390 U.S. 341 (1968) .....	13-16
“General Shale”, <i>General Shale Products Corp. v. Struck Construction Co.</i> , 132 F. 2d 425 (6 Cir. 1942), cert. denied, 318 U.S. 780 (1943) .....	4
<i>Gray v. Powell</i> , 314 U.S. 402 (1941) .....	7
“Mueller”, <i>Mueller v. United States</i> , 262 F. 2d 443 (5 Cir. 1958) .....	5-6
<i>N.L.R.B. v. Hearst Publications</i> , 322 U.S. 111 (1944) .....	9-10
“P. Lorillard”, <i>P. Lorillard Co. v. F.T.C.</i> , 267 F. 2d 439 (3 Cir. 1959) cert. denied, 361 U.S. 923 (1959) .....	10
“Purolator”, <i>Purolator Products, Inc. v. F.T.C.</i> , 352 F. 2d 874 (7 Cir. 1965), cert. denied, 389 U.S. 1045 (1965) .....	10-11
“Ratigan”, <i>Ratigan v. United States</i> , 88 F. 2d 919 (9 Cir. 1937), cert. denied, 301 U.S. 705 (1937) ..	5
<i>Sano Petroleum Corp. v. American Oil Co.</i> , 187 F. Supp. 345 (E.D.N.Y. 1960) .....	5
<i>United States v. Drum</i> , 368 U.S. 370 (1962) .....	8-9

**STATUTES:****PAGE**

Clayton Act, as amended by the Robinson-Patman  
Act, 49 Stat. 1526, 15 U.S.C. § 13:

Section 2(a) .....	10-11
Section 2(d) .....	1-3, 6, 10-11, 13
Section 2(e) .....	3, 6, 11

Federal Trade Commission Act, as amended, 66  
Stat. 632, 15 U.S.C. § 45a:

Section 5(a) .....	11
--------------------	----

Sherman Act, 50 Stat. 693, 15 U.S.C. § 1:

Section 1 .....	11
-----------------	----

**MISCELLANEOUS:**

F.T.C. Guides for Advertising Allowances and  
other Merchandising Payments and Services;  
Compliance with Sections 2(d) and 2(e) of the  
Clayton Act, as amended by the Robinson-Pat-  
man Act, 16 CFR § 2.40, 1 CCH Trade Reg. Rep.  
¶3980 .....

14

F.T.C. Proposed Amended Guides for Advertising  
Allowances and other Merchandising Payments  
and Services, 33 F.R. 10616 (July 25, 1968), 5  
CCH Trade Reg. Rep. ¶50,209 .....

14

# United States Court of Appeals For the Ninth Circuit

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CLAIROL INCORPORATED,

*Petitioner,*

*against*

FEDERAL TRADE COMMISSION,

*Respondent.*

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## PETITIONER'S REPLY BRIEF

### I

#### The Beauty Salon/Distribution versus Consumption Issue.

Government counsel's brief (R.B.) relies heavily upon an argument that inasmuch as salons, when they color their patrons' hair, process and handle Clairol's products within the meaning of section 2(d), they must also distribute such products under that section's terms. (R.B. 16, 18-20.)

The Commission did not base its decision upon any such proposition,<sup>1</sup>—probably for the good reason that it is a patent *non sequitur*. A customer can, of course, handle or process commodities without distributing them.<sup>2</sup> Conversely, he may distribute without either processing or handling.<sup>3</sup> There is no cause-and-effect relationship be-

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<sup>1</sup> Note that the Commission's decision must be valid upon its own footing, and is not to be saved by new rationalizations of its appellate counsel [Petitioner's Brief (P.B.) p. 19].

<sup>2</sup> E.g., a gasoline distributor handles not only the gasoline which he resells but also that which he uses in his trucks for making deliveries. But he distributes only the former.

<sup>3</sup> E.g., a wholesaler who has a commodity drop-shipped directly from his supplier to a retailer.

tween such distinct activities that makes the existence of one proof of the other.

Clairol's point was that the particular nature and result of the salons' handling and processing of its products are such as to terminate their existence in the hands of the salons, as materials used by them to perform their services (P.B. 3, 9-10, 17-18). Thus, beauty salons, in their utilization<sup>4</sup> of Clairol's products, fall outside the normal and customary concept of customers who purchase and 1) resell (P.B. 13-17, 21-26), 2) a supplier's commodity (P.B. 8, at n. 8). Both are vital ingredients of a section 2(d) violation. The Commission's brief does not demonstrate that they are not the true substantive requirements. Neither does it establish that they are factually supplied by the record in this case.

Clairol's brief pointed out that section 2(d) requires resale of the supplier's commodity (P.B. 13-14), and that the Commission evidently accepted that standard (P.B. 14), pivoting its decision upon a conclusion that resale of Clairol's products by the salons exists here (P.B. 19-21).

Commission counsel, however, take a more ambivalent stand. In footnote 22 (p. 29) in their brief, they offer definitions of "distribute" and "distribution" which are not coterminous with that of a sale. They then conclude: "Certainly the salons' transactions fit the stated Congressional purpose and those definitions, whether or not they also constitute sales of Clairol products."

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<sup>4</sup> The Commission decided this count upon the following identified and refined issue: "Are beauty salons, when in the course of rendering hair coloring services to their customers they utilize respondent's products, engaged 'in the distribution of' such articles within the meaning of section 2(d) of the Robinson-Patman Act?" (Tr. 89; P.B. 12.)

There are only three possibilities. Either "distribution" in section 2(d) is intended to have a meaning different from "resale" in section 2(e); or, if the words are to have a common meaning,<sup>5</sup> it must be either that of "distribution" for both sections, or of "resale" for both sections. The authorities cited at pages 13-14 of Clairol's brief speak for the last of these three constructions. The Commission's brief is not persuasive as to why they should be repudiated; and the Commission did not do so (C.O. 13, n. 12, Tr. 101; P.B. 13, 20).<sup>6</sup>

The Commission's major reliance for holding that salons resell rather than consume Clairol products is upon *Corn Products* (R.B. 21-24). However, in *Corn Products* the commodity involved (dextrose) was literally resold in unaltered chemical form, albeit as part of the total mix of a candy bar (P.B. 20, 26-27). A beauty salon, however, if it can be deemed at all to be selling a product to its patrons when it colors their hair, certainly does not resell to them "such products or commodities" as the salon has purchased from Clairol (Tr. 28-29).

This, as has been pointed out above (p. 2), is a factual difference of substantive significance. In order to avoid its impact and maintain a posture that "[t]he contention rejected in [*Corn Products*] was in all factual and legal essentials the same as Clairol's here . . ." (R.B. 21), the Commission's brief urges, "Nothing in the Supreme Court's

<sup>5</sup> The Commission's brief (pp. 20-21) agrees that the meaning should be the same, for it describes section 2(d) and 2(e) as "companion provisions" and concludes that "a decision under either section of an issue common to both is also decisive as to that issue under the other section".

<sup>6</sup> Moreover, the Commission propped its decision essentially upon analogizing the within case to *Corn Products* which dealt explicitly and solely with "resale" under section 2(e) (Tr. 101-105).

"Under the analogous facts here the Commission, too, must find a resale, as did the examiner." (Tr. 103.) (Note discussion of the examiner's finding of resale, at P.B. 21-22.)

statement of the facts or the law in *Corn Products* suggests either that it believed the dextrose was an unaltered ingredient of the candy or that lack of alteration was a factor in its decision" (R.B. 23). However, the Supreme Court thought enough of the fact to point out that the advertising for the candy stated that it was "rich in dextrose" (P.B. n. 27, at p. 20). The reference of the Supreme Court to "little or much alteration of the character of the commodity purchased and resold" must, upon the facts of the case, be read in the context of a commodity which, although changed in its physical appearance, still retains its essential chemical identity and integrity.<sup>7</sup> For, if changed in those respects, how could such products or commodities be *resold*? (P.B. n. 8, at p. 8.)

Most importantly, however, the Commission's brief, like the Commission's opinion, fails to explain satisfactorily its rejection of the unanimous authorities that transactions involving primarily the rendition of personal services, and only secondarily the utilization of products, are not deemed to be transactions of sale within the ordinary and usual meaning of the term (P.B. 9-12, 17-18, 26-27). Yet that is the intendment to be ascribed to congress (P.B. 25-26). Directly pertinent are those precedents which hold that beauty salons, in particular, engage in performing services, not selling products (P.B. 17); and especially so are those which attribute that understanding to the congress itself (P.B. 18).

The effort of the Commission's brief to distinguish *General Shale* (pp. 24-25), namely, that it involved a sale by the putative service firm rather than to it, is quite beside the point. Clairol cites *General Shale* as authority for the usual and ordinary legal concept that utilization of commodities by one who essentially renders a service does not constitute a sale of such products; even when they are as identifiable and immutable as the bricks in a building;

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<sup>7</sup> See *Armour & Co. v. Wantock* quotation at pp. 15-16, *infra*.

and even when the price of the total service contract is scaled overtly to the type of brick used; and even under the Robinson-Patman Act itself (P.B. 11, 18, 27).<sup>7a</sup> *A fortiori*, under the same statute, the rendition of hair coloring services, which involves destruction (not, as in *Corn Products*, mere masking) of product identity, and where the products do not enter as a bargaining factor into the price negotiation, is not to be deemed within the congressional contemplation of a transaction of "resale". At least, not until it has been shown that congress intended to employ the word in a manner at odds with its normal meaning. The Commission's brief proves no such intent.

While it is true that the statement from *Mueller* upon which Clairol relies (P.B. 9-10) was a *dictum* (R.B. 26), the diminution of its precedential persuasiveness stops there. Its holding, upon which the Commission relies, that sale of products actually took place (R.B. 27), has little impact here, for it was based upon an unlitigated finding of fact that had been stipulated as part of a consent cease-and-desist order.<sup>8</sup> (262 F.2d, at p. 448.)<sup>9</sup>

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<sup>7a</sup> Similarly, it has been held under the act that an arrangement in which a truck rental firm provided its lessees with gasoline as part of the lease agreement was not a sale of gasoline. *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960).

<sup>8</sup> "Par. 2. In the course and conduct of his business the Respondent for several years last past has been engaged in the sale and distribution of various cosmetic and other preparations for external use in the treatment of conditions of the hair and scalp, including sale of such preparations through use of them in connection with treatments administered in his various offices." 49 F.T.C. 586, at p. 594.

<sup>9</sup> In *Ratigan* (R.B. 28), the "service" involved was, as the court made clear, no more than a mode of delivery, i.e., injection of morphine, not in the course of medical treatment. All sales classically require delivery, and the performance of that mere function does not, simply because it is effected via a hypodermic needle, transform the essential character of the basic transaction into one for the performance of personal services.

The primary purpose of women patronizing a beauty salon, however, is not to have Clairol's products, as Clairol manufactures and sells them, simply transferred onto their hair (P.B. 3-7).

The characterization in the Commission's brief of the *Mueller dictum* as "a preliminary marking out of inapplicable extremes between which hair treatment lies" is, we submit, ill-founded. Hair treatment does not lie between the extremes described by the court. It involves more by way of personal service and less by way of product transference than even the lowest end of the court's scale of non-sale transactions (P.B. 4-6, 9-10). The court's observation is, therefore, applicable and persuasive.

Clairol's authorities establishing that "resale" does not, in its customary and natural sense, embrace the hair coloring activities of beauty salons (P.B. 17-18), are merely brushed aside by Commission counsel with the pronouncement, satisfactory to themselves, that Clairol's reliance upon them is mistaken as they are inapplicable to sections 2(d) and (e) of the Robinson-Patman Act (R.B. 28). This is, in essence, a circumlocutional claim that congress intended to use the word unnaturally in that statute. But counsel merely state the contention; they do not support it. Instead, they veer off into the foggy Wonderland in which, according to them, an administrative agency is supposedly empowered to vest a statute with whatever meaning is agreeable to the agency, provided only that it not be an unreasonable one (R.B. 29-30).

This is perilous domain. Usually, when a statute is ambiguous neither of its resolutions is wholly unreasonable. Yet, only one would be correct. It goes too far to claim that, as a general proposition of law, an agency, rather than the courts, determines the legally correct construction of the statute it administers.

The authorities cited by Commission counsel for their proposition do not go that far. It is hard to conceive how they could. To the extent that some of their generalized statements leave that impression, they must be read against their contexts, which are quite different from that at bar.

Those cases deal with statutes by which congress intended to vest in the administrative agency wide latitude to exercise its discretion, judgment, and policy in dealing with the regulated subject areas. Where that is so intended, congress uses terminology of a deliberately broad and imprecise scope. Exemplary of this is the following explanation in *Gray v. Powell*, 314 U.S. 402, at pages 411-412 (R.B. 30) :

“Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other.”

In *Gray* the question dealt with the word “producer”, defined in the Bituminous Coal Act of 1937 [15 U.S.C. §847(c)] as anyone “engaged in the business of mining coal.” So broad a classification lacks an ordinary, natural and usual meaning, such as “resale” possesses. Significantly, the court stated:

“The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept ‘producer’ is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court’s duty to leave the Commission’s judgment undisturbed.” (314 U.S., at p. 413.)

Thus, the court held, in effect, that where the status of a producer would be clear to the court (i.e. where the "separation of production and consumption is complete") the court's construction and application of the Act would unquestionably govern. Only where there is doubt as to who satisfies the statutory definition of a producer, i.e. who is "engaged in the business of mining coal", will the court leave a sensible exercise of judgment by the Commission undisturbed. In the case at bar, there can be little doubt that under controlling rules of law beauty salons do not sell Clairol products when they color hair (P.B. 17-18, 21-26), and hence the court's responsibility to rule that they do not compete in the "resale" thereof is not superseded by the Commission's exercise of discretion in its construction of that term.

*Atlantic Refining* (R.B. 29-30) involved the phrase "[u]nfair methods of competition in commerce, and unfair . . . acts or practices in commerce", in section 5 of the Federal Trade Commission Act. The court characterized this as "a broad delegation of power [empowering] the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce . . .'" (381 U.S., at p. 367.) It was as part of the same paragraph that the court wrote the statement quoted at pages 29-30 of the Commission's brief.

*U.S. v. Drum* (R.B. 30) concerned application of definitions in the Interstate Commerce Act [49 U.S.C. §303(a)] of the terms "contract carrier" and "private carrier". In the words of the court, the case involved determining "the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure. Private carriers are defined simply as transporters of property who are neither common nor contract

carriers; and the statute will yield up no better verbal guide to the reach of its licensing provisions than transportation ‘for compensation’ or ‘for hire’.” (386 U.S., at p. 376.)

In the case at bar, however, the word “resale” is not imprecise in its definitional function. Note, for example, the hearing examiner’s initial decision, Findings 59 and 60 (Tr. 73-74), adopted by the Commission (Tr. 85) :

“ ‘Sale’, or ‘offering for sale’, is defined in the Uniform Sales Act in Section 1(2) as ‘... an agreement whereby the seller transfers property and goods to the buyer for a consideration called the price.’ Many similar authoritative definitions might be cited.

“From what we believe to be the ‘normal and customary meaning’ of the word ‘sale’, a sale is a transaction which contains the following elements: a. competent parties; b. mutual assent; c. property in which title is transferred; and d. consideration, generally in the form of money paid.”

*N.L.R.B. v. Hearst Publications* (R.B. 30) turned upon the word “employee” in the National Labor Relations Act, 29 U.S.C. § 152. Starting from a basic premise that the word had no reliable uniform meaning in common law,<sup>10</sup> the court reasoned that congress intended a consistent federal application of the term rather than one dictated by the several and varying laws of forty-eight states. Therefore, said the court, there being in effect no usual and ordinary meaning of the word, congress must have intended to use it in a special sense, and—not having specified what that was—must further have wished to leave it for development under the experiential expertise of the agency dealing with

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<sup>10</sup> 322 U.S. 121-122, esp.: “Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”

the particular matters which were the subject of the statutory concern.<sup>11</sup>

In the case at bar—as pointed out immediately above—the word sale (hence “resale”) is well and clearly understood. There is no basis for finding that congress intended to use it innovatively.

*P. Lorillard* (R.B. 30) is hardly in point. The statutory phrase was “to pay or contract for the payment of anything of value to or for the benefit of a customer” in section (d) of the Robinson-Patman Act. Lorillard had made payments to third parties (radio broadcasting companies), part of which redounded to the benefit of Lorillard’s retailer customers. The Commission found such payments to be “for the benefit of” such retailers notwithstanding that the classic legal elements of a third party beneficiary contract were not present as such. Obviously, nothing in the statute requires there to be a formal, third party beneficiary contract, or even a contract of any sort. The mere making of payments for the benefit of a customer is all that is needed to cast the violation. In the within case, however, engagement in “resale” (not “use” or “consumption”) by the customer is a statutory prerequisite to offense.

Finally, in *Purolator* (R.B. 30) the issue was whether, under section 2(a) of the Robinson-Patman Act, Purolator had “discriminate[d] in price between different purchasers of commodities of like grade and quality”. Some of such purchasers did not buy directly from Purolator, but it exercised substantial control over the prices they had to pay their immediate vendors. There would seem to be little need to rely upon a doctrine of broad agency power to

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<sup>11</sup> “The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, ‘belongs to the usual administrative routine’ of the Board.” 322 U.S., at p. 130.

mold a statute in order to uphold the Commission's ruling that Purolator had in fact discriminated in price between two different purchasers by exercising control over all the relevant prices and setting them at different levels. In the case at bar, on the other hand, almost autonomous authority in the Commission would be required to allow it to hold that there has been a "resale" where there is not a sale.<sup>11a</sup>

In sum, the within case contrasts with the above line of authorities in that it involves congressional use of a familiar word with a delimited ordinary meaning. The words "sale", and hence "resale", have long history and established usage. They are not rubbery, as are phrases such as "unfair or deceptive acts or practices"<sup>12</sup> or "in restraint of trade"<sup>13</sup> or "substantially to lessen competition or tend to create a monopoly".<sup>14</sup>

Moreover, in another section of the very same statute, where congress did wish to govern more than is conveyed by the usual meaning of "resale", it employed additional, different words to denote its larger objective (P.B. 15-17).

Clearly, then, the Commission has been given no license broadly to tamper with what the congress wished to do when it chose the word "resale" to express its intent in section 2(e)—and hence for 2(d). Fuzzy generalities (e.g., that the underlying purposes of sections 2(d) and 2(e) to prevent evasion of section 2(a) would be frustrated if the provisions of 2(d) and 2(e) relating to resales could not also be applied to transactions that are not really resales [R.B. 25-26]) are of little moment where the congres-

<sup>11a</sup> "I've often seen a cat without a grin, but a grin without a cat! It's the most curious thing I ever saw in all my life!" *Alice in Wonderland*.

<sup>12</sup> F.T.C.A. § 5(a), 15 U.S.C. § 45(a).

<sup>13</sup> Sherman Act § 1, 15 U.S.C. § 1.

<sup>14</sup> Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a).

sional intent has been clearly and specifically identified by its choice of so well-understood a word as "resale". All the more so, where that word's customary meaning accords thoroughly with the fundamental legislative intent to deal in the Robinson-Patman Act only with competition in the sale of commodities and products, not in the rendition of services (P.B. 15-17).

Clairol's brief analogized the distributional structures and consumption patterns of its products to those of a laundry bleach (P.B. 8, 10). The Commission's brief does not claim that the analogy is in any way false; and it does not argue that laundries do compete in the distribution (resale) of the bleaches they use upon their customers' wash. In fact, the Commission's brief treats the analogy with an utter silence which, we suppose, is intended to be disdainful.

Yet, we submit, the analogy makes the point. And it can be extended to illuminate the inapplicability of *Corn Products*. Assume that the manufacturer of a dry bleach preparation sells it to two types of customers, (1) laundries which mix it with their detergents and then use them in the performance of their usual services, and (2) sub-manufacturers who mix the dry bleach with detergent powders and sell the detergent-bleach mixture to their customers. It would seem clear that the sub-manufacturers compete with each other in the distribution of the original bleach, well within the concept of *Corn Products*, but that the laundries do not.

The bearing of the analogy upon this case is enhanced if it be further assumed that the result of the laundries' mixing of bleach and detergents is to chemically destroy the bleach.

## II

**The *Meyer* Form of Order Issue.**

The difference between the forms of order proposed by Clairol (P.B. 28-29) and by the Commission (R.B. 32-33) is: the former extends the obligation of equal availability of Clairol's cooperative promotional programs to competing retailers and salons who purchase from wholesalers to whom Clairol has sold, while the Commission would have it embrace all competing retailers and salons, regardless of how many intermediate buyers and resellers may have intervened between them and Clairol.

Clairol's form of order adheres to the true holding of *F.T.C. v. Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968); the Commission's breaks new ground. The difference is far more than technically legalistic.

It is common, in the distribution of cosmetic items such as Clairol's, for the merchandise to pass through many, quite untraceable hands, before reaching the ultimate retailer. There are innumerable wholesalers and sub-wholesalers. Individuals will buy enough merchandise from such distributors to load a passenger car or station wagon, and peddle it to small retailers or salons. One retailer or salon may buy occasionally from another. Some "retailers" may be house-to-house peddlers; and beauticians may operate in their own homes, or in those of their customers.

It is simply impossible for Clairol, or any other sizable manufacturer, to fulfill an obligation to deal with every such "retailer" or "salon" under section 2(d). There is no way it can identify or keep track of them; and if there were, the cost of doing so would be prohibitive. Yet, presumably, Clairol would be in violation of the Commission's order:

1. If it failed to get actual notice through to every such retailer or salon of any promotional plan

or allowance it had available for any competing direct customer (Guide<sup>15</sup> 6(b) and 8; Pr. G.<sup>16</sup> 6(b) and 8).

2. If it failed to design the promotional program or allowance so that every one of that variegated multitude of retailers or salons could render the services or perform the acts necessary to qualify under it (Guide 9; Pr. G. 9).

3. If it failed to police every such retailer and salon to make sure that it actually performed the services and acts necessary to qualify for the benefits or allowances before making payment thereof, including cost accounting adequate to insure that such outlet received no payment in excess of what it actually used to perform the service (Guide 11; Pr. G. 11).

4. If it failed to get proper payment through to any such retailer or salon.

There can be only one solution to such impossible burdens: to discontinue all cooperative promotional programs. Obviously, neither the congress nor the Supreme Court intended that.

The facts actually before the Supreme Court in *Meyer*, and hence the delimitation of its holding, dealt only with retailers no further removed in the chain of distribution from the manufacturer than those who bought from the

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<sup>15</sup> F.T.C. Guides for Advertising Allowances and other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act. 16 CFR Part 2.40, 32 F.R. 15542 (Nov. 8, 1967), 1 CCH Trade Reg. Rep. ¶ 3980.

<sup>16</sup> F.T.C. Proposed Amended Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 F.R. 10616-10619 (July 25, 1968), 5 CCH Trade Reg. Rep. ¶ 50,209.

wholesalers to whom he sold. Clearly, such retailers would be far easier (although still not easy) to trace, identify, and maintain the requisite relationships with, than retailers at increasingly further levels of sub-distribution. Indeed, it seems to have been within the express contemplation of the Supreme Court that a manufacturer, working through his direct wholesalers, could feasibly reach to *their* immediate customers.<sup>17</sup>

“The Commission argues here that the view we take of § 2(d) is impracticable because suppliers will not always find it feasible to bypass their wholesalers and grant promotional allowances directly to *their* numerous retail outlets.[!] Our decision does not necessitate such bypassing . . . Nothing we have said bars a supplier from utilizing *his* wholesalers to distribute payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices, for seeing that the allowances are made available to all who compete in the resale of his product.” 390 U.S. 341, at p. 358 (emphasis ours).

There is no reason to assume that the Supreme Court’s decision would have been the same in a different factual setting, *i.e.*, where the retailers involved are so far removed from, unknown and unknowable to, and unreachable by the supplier that he cannot assure the allowances will be available to every one of them, within the Commission’s concepts of availability (*supra*, pp. 13-14).

“It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be sug-

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<sup>17</sup> “But rather than concluding, as we have, that retailers who purchase through Hudson House and Wadhams [direct buying wholesalers] . . . were disfavored customers of Tri-Valley and Idaho Canning [the manufacturers] . . .” 390 U.S. at p. 355 (emphasis ours).

gested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading." *Armour & Co. v. Wan-tock*, 323 U.S. 126, 132-133 (1944).

Proof that cooperative promotional programs would be inoperable under the type of order now proposed by the Commission (*supra*, pp. 13-14) was not made during this proceeding, as it would have been immaterial to any issue then pending. At that time the Commission's concept (and order) in the *Meyer* case was that the supplier was obligated to extend its retailer cooperative promotional programs only to *direct* buying customers, *i.e.* to retailers and to wholesalers who sell to competing retailers. The Commission itself agreed, as the Supreme Court recognized in the passage quoted above, that "suppliers will not always find it feasible to bypass their wholesalers and grant promotional allowances directly to their numerous retail outlets." No record had to be made of that, therefore, during the administrative proceeding herein on April 30, 1965 (Tr. 48).<sup>18</sup>

Minimally, therefore, the Commission's form of order, imposing such novel and drastic impediments upon cooperative promotional programs, should not be sanctioned without an opportunity for Clairol to litigate the issues which such a proposed order raises. Clairol has had neither notice nor chance to do so thus far. To place it under so stringent an order without a day in court to present pertinent evidence against it would be a severe deprivation of due process.

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<sup>18</sup> The Supreme Court's conception of an extended obligation to the retailers themselves was not articulated until March 18, 1968.

## Conclusion

The Commission's cease and desist order should be modified by striking therefrom clauses 2(a) and 2(b), and by revising clauses 1(a) and 1(b) to conform with the Supreme Court's decision in *Meyer*, to wit:

1. Clause 1(a) should be amended to make clear that the "retailer customer" and "retailer customers" referred to therein are retailers who purchase directly from Clairol.
2. Clause 1(b) should be changed to read:

"Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer who buys directly from respondent unless such payment is available on proportionally equal terms to all other retailers who purchase such products of respondent from wholesalers to whom respondent has sold such products, and who compete with the favored retailer customer in the resale of respondent's hair care products to consumers for home use."

Respectfully submitted,

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NO. 21077

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

REB 26 1969

JACK C. WILLIAMS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

MAY 20 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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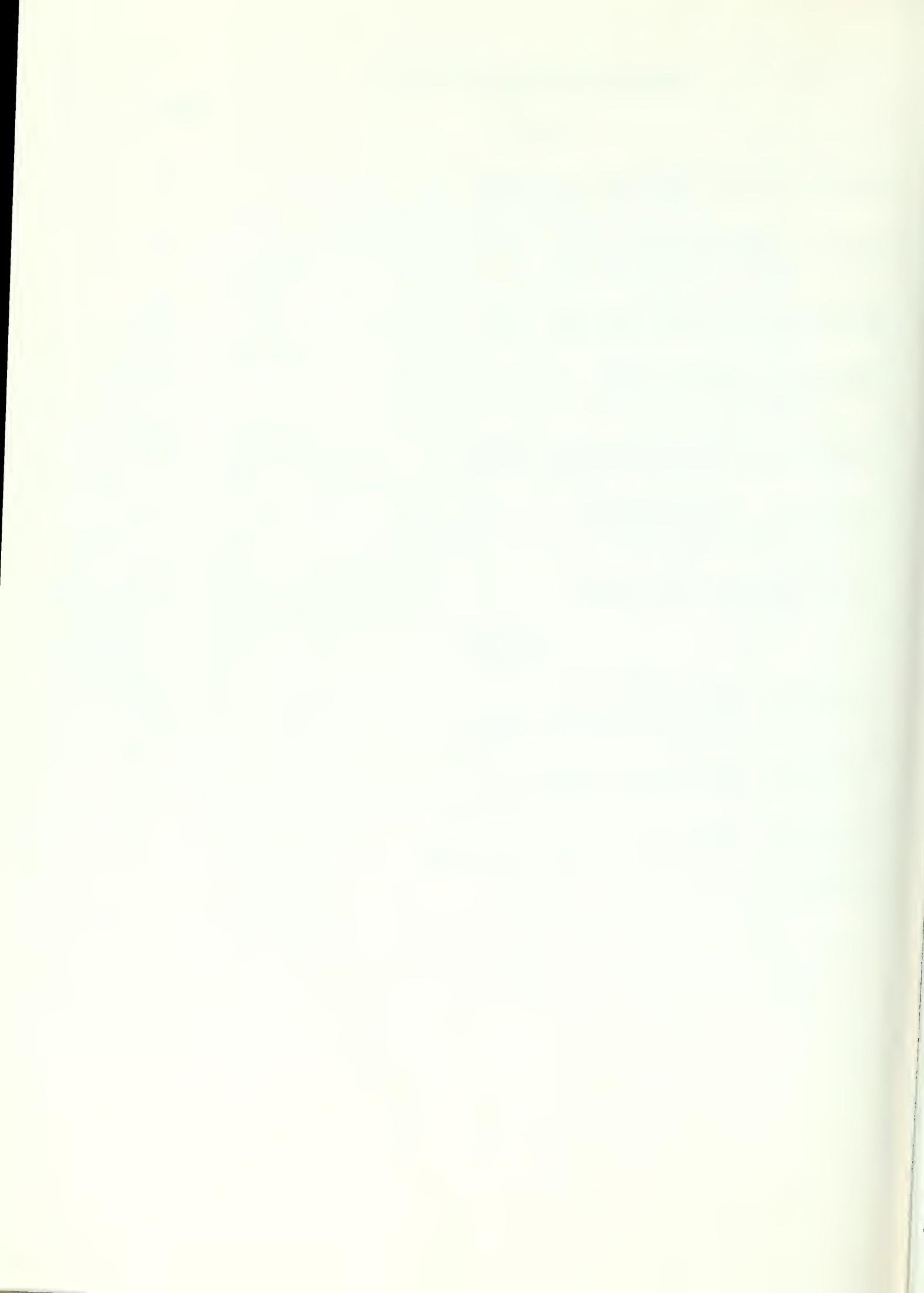
## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.	1
II STATUTES INVOLVED	4
III QUESTIONS PRESENTED	4
IV STATEMENT OF FACTS	5
V ARGUMENT	6
A. THE SEARCH MADE OF APPELLANT'S APARTMENT BY AGENTS OF THE UNITED STATES SECRET SERVICE ON OR ABOUT NOVEMBER 12, 1965 WAS A LEGAL AND PROPER ONE.	6
B. THE QUESTION OF THE COMPETENCE OR EFFECTIVENESS OF APPELLANT'S TRIAL COUNSEL IS NOT PROPERLY BEFORE THIS COURT.	9
C. APPELLANT WAS NOT DENIED A RIGHT TO SUBPOENA WITNESSES AT THE TRIAL BELOW.	10
CONCLUSION	10
CERTIFICATE	11



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Billeci v. United States, 290 F. 2d 628 (9th Cir. 1961)	9
Burks v. United States, 287 F. 2d 117 (9th Cir. 1961)	8
Fraker v. United States, 294 F. 2d 859 (9th Cir. 1961)	9
Harris v. United States, 331 U. S. 145 (1947)	8
O'Neal v. United States, 310 F. 2d 175 (9th Cir. 1961)	9
Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1961)	9
United States v. Rabinowitz, 339 U. S. 56 (1950)	8
<u>Statutes</u>	
Title 18, United States Code, §371	1
Title 18, United States Code, §472	3, 4
Title 18, United States Code, §3231	3
Title 28, United States Code, §1291	3
Title 28, United States Code, §1294(1)	3



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APPELLEE'S BRIEF

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I

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION

On December 15, 1965, the Federal Grand Jury for the Southern District of California returned an indictment in sixteen counts, naming as defendants the appellant, Jack C. Williams, and five other persons. Appellant was named as defendant in Counts One, Twelve, Thirteen and Fourteen of the indictment; however, Count One, which charged a conspiracy among all six defendants in violation of Title 18, United States Code, Section 371, and Count Fourteen, were dismissed on February 10, 1966, as to appellant, prior to the swearing of the Government's first



witness at the trial below [R. T. 77]. 1/

Count Twelve of the indictment reads as follows:

"On or about November 19, 1965, in Orange County, within the Central Division of the Southern District of California, defendant JACK C. WILLIAMS, with intent to defraud, passed, uttered, published and sold a \$100 Federal Reserve counterfeit note, bearing serial number L-14478740-C, a falsely made, forged and counterfeited obligation and security of the United States as the defendant then and there well knew."

Count Thirteen of the indictment reads as follows:

"On or about November 19, 1965, in Orange County, within the Central Division of the Southern District of California, defendant JACK C. WILLIAMS, without authority from the Secretary of the Treasury or any other proper official, had in his possession and custody counterfeit Federal Reserve note, bearing serial number L-14478740-C, an obligation and security issued under the authority of the United States, knowing the same to be falsely made, forged and counterfeited, with intent to sell and use the same."

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1/ "R. T." refers to the Reporter's Transcript herein.



On February 9, 1966, all five of appellant's co-defendants entered pleas of guilty to various counts of the indictment. Appellant's own plea of not guilty, which had been entered on January 3, 1966, continued in effect, and a jury was then sworn to try appellant on Counts One, Twelve, Thirteen and Fourteen of the indictment [R. T. 50]. On February 10, 1966, as hereinabove noted, Counts One and Fourteen of the indictment were dismissed. Jury trial commenced on February 10, 1966, and concluded on February 11, 1966, when the jury returned a verdict of guilty against appellant on Counts Twelve and Thirteen of the indictment.

On March 21, 1966, after the court denied a motion for a new trial [R. T. 217], judgment of conviction was entered against appellant on Counts Twelve and Thirteen of the indictment. At the same time, appellant was sentenced to a term of ten years imprisonment on each of the two counts, to run concurrently, and bond on appeal was set at \$4,000 [R. T. 219-220].

Appellant filed a timely notice of appeal on March 21, 1966 [C. T. 54]. 2/

Jurisdiction of the District Court for the Southern District of California, Central Division, was based on Title 18, United States Code, Sections 472 and 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

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2/ "C. T." refers to the Clerk's Transcript herein.



II

STATUTES INVOLVED

Title 18, United States Code, Section 472, provides:

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both."

III

QUESTIONS PRESENTED

1. Was the search made of appellant's apartment by Agents of the United States Secret Service on or about November 21, 1965 an illegal search?
2. Is the question of the competence or effectiveness of appellant's trial counsel properly before this Court?
3. Was appellant denied a right to subpoena witnesses at the trial below?



STATEMENT OF FACTS

On November 19, 1965, at about eight or nine o'clock P. M., appellant, accompanied by one other man, visited the Whistler Liquor Store in Long Beach, California [R. T. 55, 103-104]. On duty at the liquor store was clerk Max Schwab [R. T. 103]. Appellant ordered from Schwab three bottles of Chivas Regal Scotch whiskey, some drink mix, and a pack of cigarettes [R. T. 104]. Appellant gave Schwab a \$100 Federal Reserve note for his purchase, and received about \$70 change [R. T. 104, 105, 106]. That Federal Reserve note, Government's Exhibit 2 below, was counterfeit, and was stipulated to be so at trial [R. T. 119-120].

Also on November 19, 1965, at about 10:30 or 11:00 o'clock P. M., again accompanied by another man, appellant visited the Westminster Liquor Store in Westminster, California [R. T. 82-83]. At that time he engaged the store clerk, Marie Eddy, in conversation for about fifteen minutes [R. T. 83]. Appellant purchased three more bottles of Chivas Regal Scotch whiskey, some beer and a pack of cigarettes, and in payment presented to Mrs. Eddy a second counterfeit \$100 Federal Reserve note [R. T. 84, 119-120]. Appellant told Mrs. Eddy that he was purchasing the whiskey for a party being planned for the brother of his companion [R. T. 85].

Subsequently, on November 22, 1965, appellant was arrested by agents of the United States Secret Service at his



apartment in Wilmington, California [R. T. 163].

V

ARGUMENT

- A. THE SEARCH MADE OF APPELLANT'S APARTMENT BY AGENTS OF THE UNITED STATES SECRET SERVICE ON OR ABOUT NOVEMBER 12, 1965 WAS A LEGAL AND PROPER ONE.
- 

At the trial below, Darwin Horn, an agent of the United States Secret Service who participated in the investigation of appellant's case, testified concerning the circumstances of appellant's arrest and of the search of appellant's apartment attendant thereto. Agent Horn testified that on November 22, 1965, at about 9:00 P. M., he personally arrested appellant at appellant's residence, the El Monterey Hotel, located at 233 Avalon in Wilmington, California [R. T. 111].

After arresting appellant, Agent Horn participated in a search of appellant's apartment, where the arrest occurred. Found in the search, in the bedroom of the apartment, were various bottles of liquor, including a total of eleven bottles of Chivas Regal Scotch whiskey [R. T. 113].

The search incident to appellant's arrest is attacked by appellant as an unlawful search, and appellant thus argues in his brief that the reference in Agent Horn's testimony to the Chivas Regal Scotch (the same brand as had been purchased by appellant



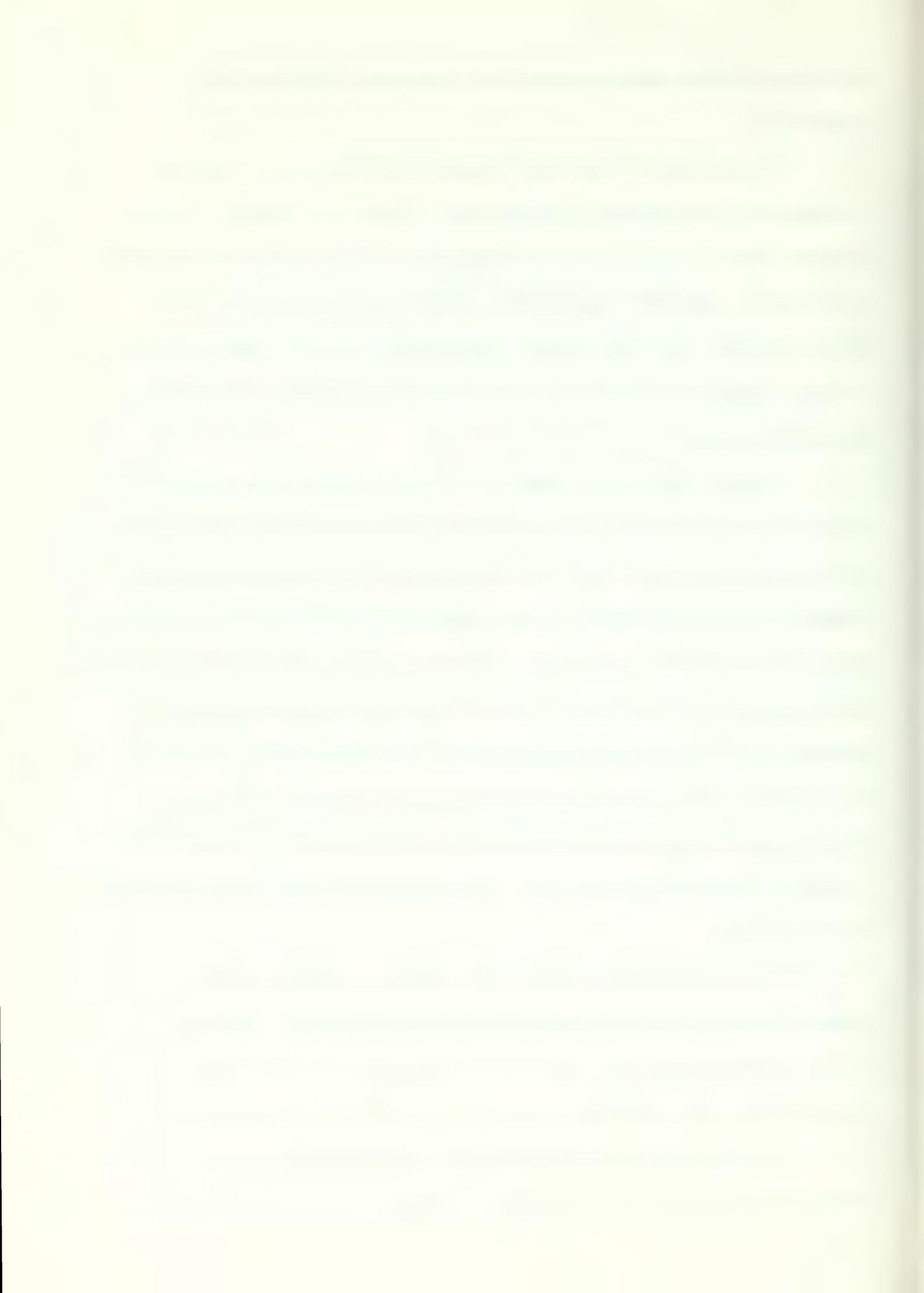
at the two liquor stores) should not have been allowed into evidence.

At the time of hearing of appellant's Motion to Suppress evidence of the product of the search, in the Court below, it was agreed that the only issue concerning the search was the existence of probable cause for appellant's arrest on November 22, 1965 [R. T. 52-53]. At that hearing concerning probable cause for the arrest, Agent Horn testified substantially as follows concerning probable cause:

On the night of November 19, 1965, Horn interviewed Max Schwab of the Whistler Liquor Store. Schwab told him that a man had presented to him that same evening a \$100 bill which Schwab believed to be counterfeit. Horn examined the bill and determined that it was indeed counterfeit. Schwab told Horn that when the note had been given to him he felt there was something wrong with it and he therefore asked his assistant, one Steve Meyer, to follow the passer of the bill and obtain the license number of his car. This license number had been reported by Meyer to be LMY 123, a 1965 California license plate. The car was a 1961 beige Lincoln [R. T. 55-56].

Through the facilities of the California Department of Motor Vehicles, Horn determined that license LMY 123 was registered to appellant, Jack C. Williams [R. T. 56]. Horn looked for the car in Long Beach on the 19th and 20th of November, 1965.

In addition, Horn on November 22nd was told by one Leland Potter that appellant had passed counterfeit bills and that Potter



had given counterfeit bills to appellant. Horn was also told by Pat and June Carter that Williams had been involved in the passing and distribution of counterfeit \$10 and \$100 bills in the area of Wilmington, California [R. T. 60]. Horn chose a time to arrest appellant (November 22, 1965 at about 9:00 P. M.) when he believed that both appellant and appellant's father would be at the El Monterey Hotel [R. T. 59].

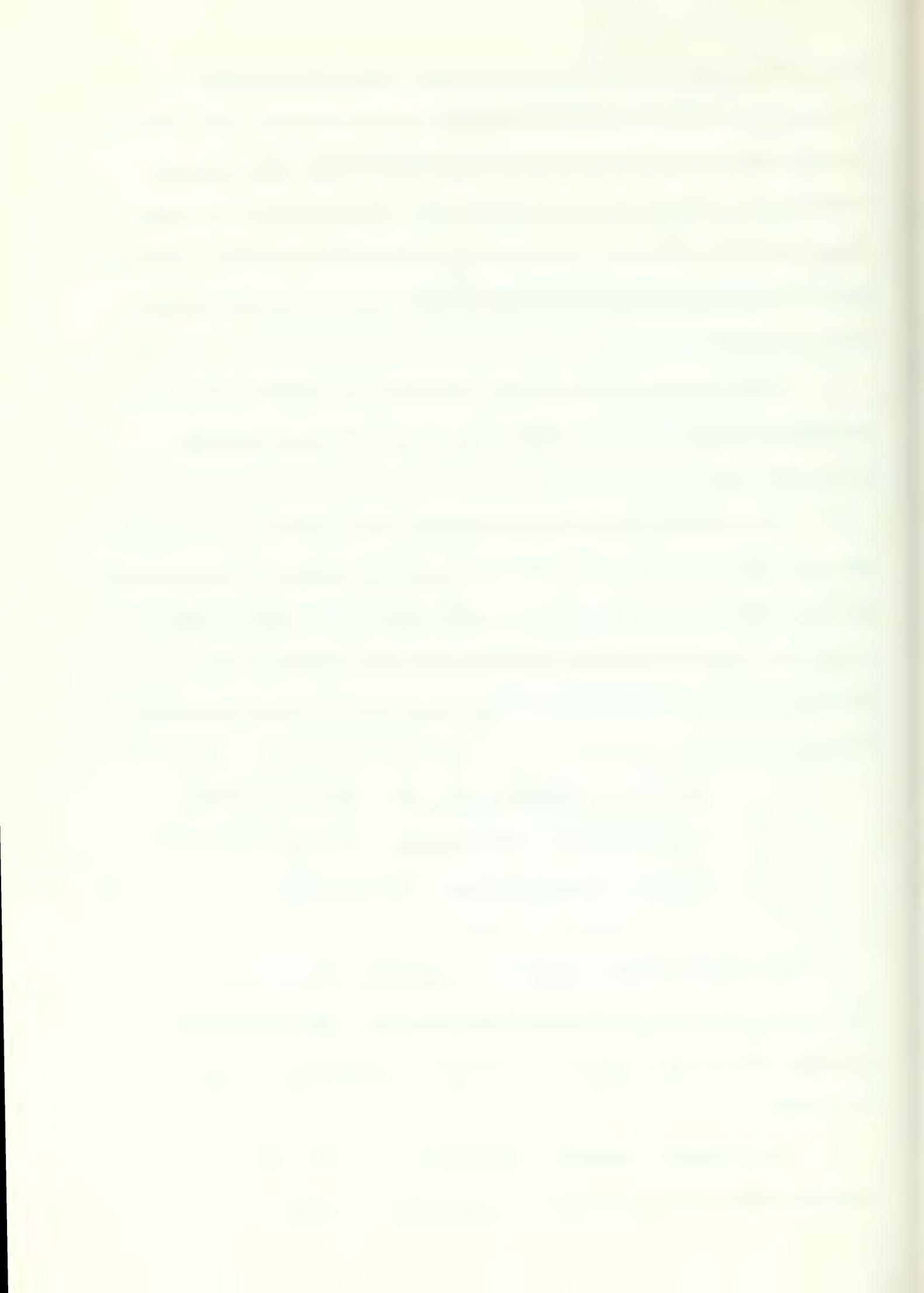
Based upon the foregoing, the trial court denied the Motion to Suppress [R. T. 71] and held there was sufficient probable cause for appellant's arrest.

It is submitted that the foregoing facts speak for themselves and that there was clearly sufficient probable cause for appellant's arrest at the El Monterey Hotel on November 22, 1965. This being so, the search of appellant's apartment incident to his arrest, which turned up several bottles of Chivas Regal whiskey, was also lawful.

Harris v. United States, 331 U.S. 145 (1947);  
United States v. Rabinowitz, 339 U.S. 56 (1950);  
Burks v. United States, 287 F.2d 117  
(9th Cir. 1961).

The whiskey was found in the bedroom of appellant's apartment, certainly an area of the premises under appellant's custody and control which could lawfully be searched incident to his arrest.

Accordingly, no error appears in the trial court's admission of Agent Horn's testimony concerning the bottles of Chivas



Regal whiskey found during the search of appellant's bedroom.

B. THE QUESTION OF THE COMPETENCE  
OR EFFECTIVENESS OF APPELLANT'S  
TRIAL COUNSEL IS NOT PROPERLY  
BEFORE THIS COURT.

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In his brief (pp. 23-25) appellant complains that his trial counsel failed to call as witnesses certain co-defendants who had entered their pleas of guilty to the indictment. These witnesses are not named, but appellant appears to be arguing that the failure to call them constituted incompetence on the part of trial counsel, and deprived appellant of his right to counsel at the trial. There is no authority for this position, nor was the trial court asked by appellant to require the presence of any of these witnesses.

Not having objected or preserved any objection to the character of his representation at trial, appellant is foreclosed on appeal from raising the issue.

Billeci v. United States, 290 F.2d 628

(9th Cir. 1961);

Fraker v. United States, 294 F.2d 859

(9th Cir. 1961);

Ramirez v. United States, 294 F.2d 277

(9th Cir. 1961);

O'Neal v. United States, 310 F.2d 175

(9th Cir. 1961).



C. APPELLANT WAS NOT DENIED A  
RIGHT TO SUBPOENA WITNESSES  
AT THE TRIAL BELOW.

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The Government is in entire agreement with the position stated by appellant at pages 25 through 38 of his brief, to the effect that appellant had a right to call his co-defendants who had pleaded guilty as witnesses in his own behalf. But the further contention, that appellant was deprived by the trial court of the right to subpoena these witnesses, is without support in the record.

The trial court initially allowed appellant a period of nearly one day to find and subpoena the witnesses [R. T. 5] with more time available if needed. Thereafter, the record shows no effort on the part of appellant or his counsel to effect service of the subpoenas or to obtain more time to do so. Under the circumstances, no error appears on the part of the trial court.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,  
United States Attorney,  
ROBERT L. BROSIO,  
Assistant U. S. Attorney,  
Chief, Criminal Division,  
MICHAEL HEUER,  
Assistant U. S. Attorney,  
Chief, Complaint Section,

Attorneys for Appellee,  
United States of America.



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer

MICHAEL HEUER



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HELEN WEBER, )  
                  )  
                  Appellant, )  
                  )  
vs.              )  
                  )  
RALPH AOKI, TRUSTEE, )  
                  )  
                  Appellee. )  
                  )  
                  )

---

APPELLANT'S OPENING BRIEF

FILED

OCT 18 1968

WM. B. LUCK, CLERK

JOHN E. PARKS 382  
412 First National Bank Building  
Honolulu, Hawaii 96813

Attorney for Appellant



## TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
CITATIONS	ii
STATEMENT OF JURISDICTION	1-2
STATEMENT OF THE CASE	2-6
QUESTION PRESENTED	6
SPECIFICATIONS OF ERROR	7-8
SUMMARY OF THE ARGUMENT	8-9
ARGUMENT	9-12
ACCEPTANCE OF THE COMPROMISE WAS ERROR AS A MATTER OF LAW	12-15
CONCLUSION	15-16



## CITATIONS

	Page(s)
9 American Jurisprudence 2d, (Title, Bankruptcy) page 918, Section 1252	10
9 American Jurisprudence 2d, (Title, Bankruptcy) page 918, Section 1253	10
Bankruptcy Act, Section 1(3)	2
Bankruptcy Act, Section 2A	1
Bankruptcy Act, Section 24(a)	2
8 B C.J.S., Section 621(e), pages 237 and 238	10
8 B C.J.S., Section 622, pages 240 and 241 (Title, Bankruptcy)	16
<u>California Assoc. Prod. Co. vs. Wil-Rud Corp. vs. Lynch, et al</u> (9th CCA, 1950), 183 F2d 946, and cases cited page 949, Note 6	14
<u>Kaufman-Brown Potato Co. vs. Long</u> (9th CCA, 1950, 182 F2d 594, 597	14
<u>In Re Power Eng. Co. vs. Chatham Bank</u> (7th CCA, 1949), 177 F2d 240	14
11 U.S.C., Section 1(3)	2
11 U.S.C., Section 11(a)	1
11 U.S.C., Section 47	2
28 U.S.C., Section 1334	1



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HELEN WEBER, )  
                  )  
                  Appellant, )  
                  )  
vs.              )  
                  )  
RALPH AOKI, TRUSTEE, )  
                  )  
                  Appellee. )  
                  )  
                  )  
                  )

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APPELLANT'S OPENING BRIEF

JURISDICTION

This is an Appeal from the United States Court for the District of Hawaii. The jurisdiction of the lower court was conferred by virtue of the Bankruptcy Act, Section 2A.

Also, 11 U.S.C., Section 11(a).

And, 28 U.S.C., Section 1334.

The initial proceeding was commenced in the District Court of Hawaii by the filing of a proceeding for the reorganization of Weber Trucking & Equipment Rental, Inc., under Chapter X of the Bankruptcy Act (Record 2). Thereafter an Order was entered approving the Debtor's Petition (Record 25).



However, on November 1, 1966, an Order was entered dismissing the proceeding for reorganization and adjudging Weber Trucking & Equipment Rental, Inc., a bankrupt (Record 32).

The Notice of Appeal was filed herein on January 18, 1968 (Record 79). Extensions of time were granted for the filing of the Appellant's Opening Brief.

The amount involved is over \$500.00.

Jurisdiction of this Court is conferred by the Bankruptcy Act, Section 1(3).

Also, Bankruptcy Act, Section 24(a).

And, 11 U.S.C., Section 47.

And, 11 U.S.C., Section 1(3).

#### STATEMENT OF THE CASE

This is an Appeal by Helen Weber, a creditor of Weber Trucking & Equipment Rental, Inc. (Record 60). Helen Weber was formerly President of the corporation (Record 6). This corporation, hereinafter referred to as "WEBER, INC.," was a small corporation. (Balance Sheet attached as Exhibit "B" to Debtor's Petition, Record 14 and Record 15) Its working capital had been depleted. One obligation in excess of \$56,000.00 was owed to it by J. P. Finan General Contractor, Inc., hereinafter referred to as "FINAN, INC." (Record 39).



On June 24, 1966, Weber, Inc., filed suit in the First Circuit Court of Hawaii against Finan, Inc., for the collection of the \$56,000.00 debt (Record 39). Finan, Inc., filed a counterclaim against Weber, Inc., alleging that the sum of \$61,084.61 was owed by Weber, Inc., to Finan, Inc. No details of the alleged counterclaim were set forth (Record 39 and Record 68). Accordingly, on July 27, 1966, the attorney for Weber, Inc., sought through pre-trial procedure to either dismiss the counterclaim for failure to set forth the basis thereof, or to obtain sufficient facts with respect to the alleged counterclaim. The Motion and Alternative Motion were denied by the Circuit Court. Thus at that point, absolutely no details with respect to the alleged counterclaim had been learned.

With its working capital tied up, Weber, Inc., found it necessary to file a Debtor's Petition on July 6, 1966, in the United States District Court for the State of Hawaii (Record 2 and Record 68).

On November 1, 1966, the Debtor's Petition was dismissed and Weber, Inc., was adjudged a bankrupt (Record 32). Pursuant to a Petition by the Trustee in Bankruptcy to intervene in the Circuit Court suit by Weber, Inc., against Finan, Inc., (Filed in the Bankruptcy Court on January 13, 1967) the Trustee and his attorney replaced the attorney for Weber, Inc. (Record 36). On January 16, 1967, the formal Order was entered by the Bankruptcy Court granting the Petition to Intervene and authorizing the Trustee and his attorney to carry on the proceedings to collect the \$56,000.00 from Finan, Inc., in the Circuit Court suit (Record 37-B).

No attempt was ever made by the Trustee or his attorney to continue



the pre-trial discovery proceedings in the Circuit Court suit, in order to determine whether the counterclaim was a sham (Record 66).

On March 21, 1967, the Trustee for Weber, Inc., filed a Petition for Leave to Compromise the \$56,000.00 claim of Weber, Inc., against Finan, Inc., for the token sum of \$5,000.00. The basis of the Trustee's Petition to compromise the \$56,000.00 claim for \$5,000.00 was the request of the attorney for Finan, Inc., asking for the compromise (Record 41), and the statement contained in the Petition that the Referee and his counsel had held "a series of negotiations and conferences" and the "parties" had "agreed to compromise the above suit by the payment of \$5,000.00" (Record 39).

When it came to the attention of Appellant, Helen Weber, that the Trustee intended to compromise the \$56,000.00 claim, a Petition was filed with the Referee for the disallowance of the Trustee's requested compromise (Record 41-A).

On April 4, 1967, the Petition for Disallowance of the claim was filed in the Bankruptcy Court (Record 41-A). This Petition was based on the Affidavit of H. R. Weber attached thereto (Record 41-C and Record 41-D). This Affidavit showed, inter alia, that Finan, Inc., "has admitted that it owes the bankrupt \$24,154.00 on the subcontracts only (there being additional amounts owed on other items) and thus there was only a difference of \$4,963.34 in dispute with respect to the subcontracts" (Record 41-C and Record 41-D). At the time of the hearing the Referee in Bankruptcy stated that he proposed to accept the \$5,000.00 compromise offer. Since it was admitted by the Trustee's attorney that the \$5,000.00 figure had simply been "picked out of the air,"



and as there had been no further pre-trial discovery in order to require Finan, Inc., to disclose whether, in fact, the alleged counterclaim was simply a sham, and as the Trustee had not even examined the books and records of Finan, Inc., at the hearing, the attorney for the Appellant requested permission of the Referee in Bankruptcy to examine J. P. Finan, President of Finan, Inc., and his accountant Rex Clay, and others, to determine whether there was any basis or reason for accepting the compromise (Clerk's Minutes, Record 93). Thus, the burden was placed upon the Appellant, Helen Weber, by the Referee in Bankruptcy, to try and show whether there was a basis for the compromise.

J. P. Finan, President of Finan, Inc., was called by Appellant as a witness but he was unable to give any facts to support the counterclaim. The accountant, Rex Clay, was called by Appellant as a witness but he also was unable to give any information to support the counterclaim. Even the bookkeeper for Finan, Inc., was called by Appellant, and likewise he was unable to give any testimony to support the counterclaim. He testified it would be necessary for him to examine the records of Finan, Inc., before he would be able to give testimony in that connection (Clerk's Minutes, Record 92, and Tape Recording).

There being no evidence and thus no basis for accepting the \$5,000.00 offer (other than the statement in the Petition that it was based on "conferences" and the letter from Finan, Inc.'s attorney requesting the compromise), the Referee in Bankruptcy nevertheless held that he would accept the offer (Record 42 and Record 44). Thereupon the attorney for the Appellant asked that



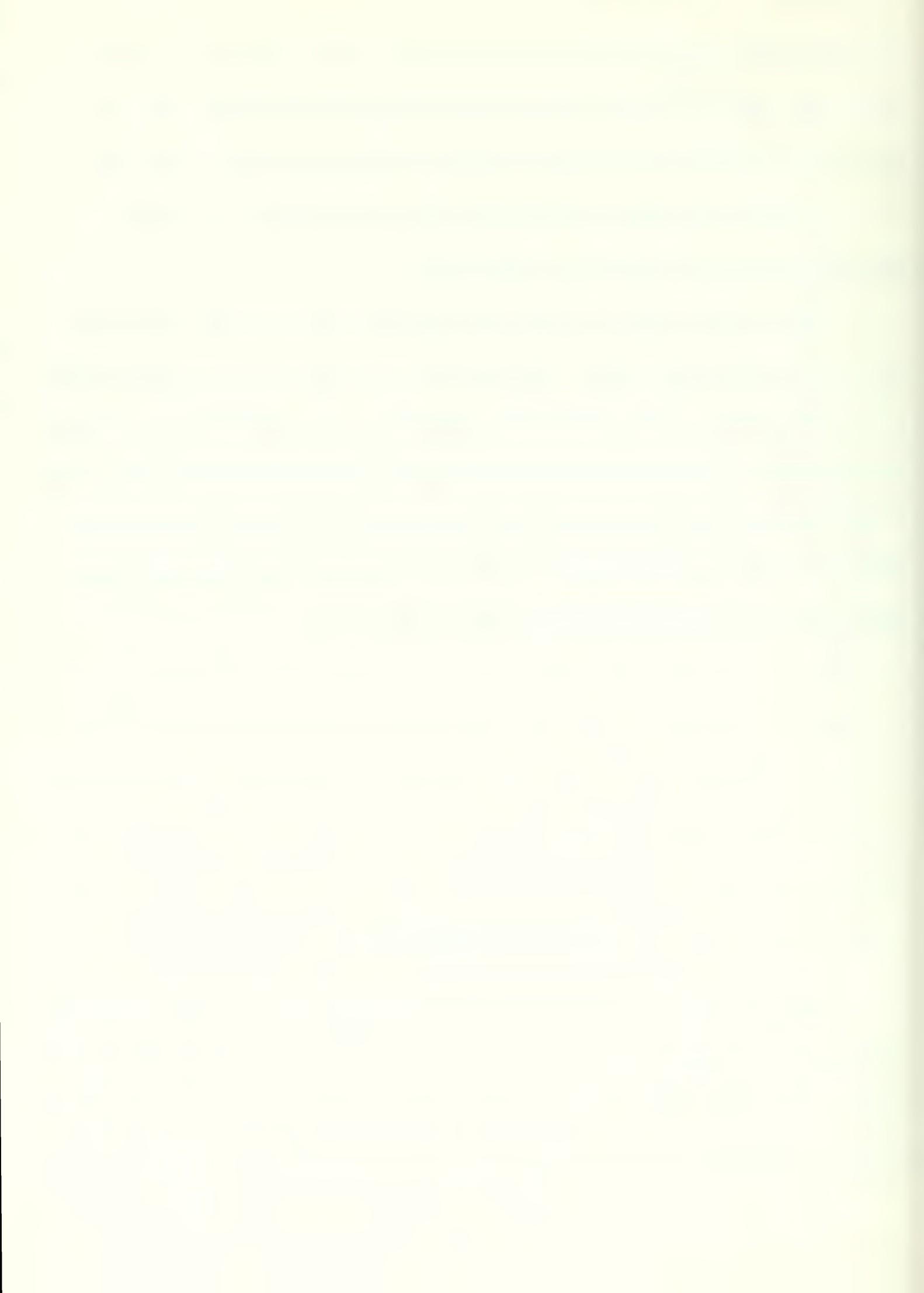
an examination of the books of account of Finan, Inc., be made at Appellant's expense, by a person selected by the Referee (Record 69). This request was denied by the Referee in Bankruptcy (Record 43 and Record 44).

On April 28, 1967, a Petition for Review was filed in the United States District Court for Hawaii (Record 45).

This Petition alleged, inter alia, that there was no basis for acceptance of the compromise offer. Also that the compromise was an abuse of discretion as a matter of law (Record 46 and Record 47). The Petition for Review, although denied, was nevertheless left open in certain respects by the United States District Court for Hawaii (Tape Recording). A Petition for Rehearing (Record 65 and Record 69) came on before a substitute Judge and was denied (Record 72). This Appeal was then taken (Record 79).

#### QUESTION PRESENTED

Was the Order of the District Court of Hawaii, affirming the Referee's approval of the compromise of the bankrupt's claim against Finan, Inc., in the amount of \$56,201.61 for the token sum of \$5,000.00, error, as constituting an arbitrary action and thus an abuse of discretion.



## SPECIFICATIONS OF ERROR

The District Court of Hawaii erred in affirming the Referee's approval of the \$5,000.00 compromise because:

(1) It was an abuse of discretion and constituted an arbitrary action as a matter of law.

(2) The basis of the compromise was the alleged counterclaim of Finan, Inc. Admittedly, neither the Trustee, his attorney, the Referee, or the Court, ever knew whether the counterclaim was a sham (even though such was evident from that pleading and the other facts). It was therefore error as a matter of law to accept the token sum of \$5,000.00 in settlement of the \$56,201.61 obligation owed by Finan, Inc.

(3) The burden was upon the Trustee to establish, by more than a scintilla of evidence, that there was a basis for the compromise of the alleged counterclaim of Finan, Inc.

(4) As a matter of law, the Order of April 20, 1967, approving the Trustee's Petition for Leave to Compromise the \$56,201.61 debt was an abuse of discretion (Record 43 and Record 44).

(5) "Negotiations and conferences" did not constitute proof of the alleged counterclaim.

(6) Until the books and records of account of Finan, Inc., were examined, all of the talk, conferences and negotiations in the world would not disclose whether Finan, Inc., had a counterclaim against Weber, Inc., and whether the amount thereof was \$6.00, \$6,000.00 or some other figure, which



fact, and the proof thereof, was contained, if at all, only in the books of account of Finan, Inc.

(7) Exhibit "A" attached to the Trustee's Petition for Leave to Compromise (Record 41) was, as a matter of law, insufficient to justify the acceptance of the sum of \$5,000.00 in compromise.

(8) The Appellant, Helen Weber, was required by the Referee and the District Court of Hawaii to assume the burden of proof (Record 62). However, even though Appellant was entirely willing to discharge such burden, and to, at her expense, have the records of Finan, Inc., examined, the Referee and the District Court refused to permit such examination. This was an arbitrary action and an abuse of discretion (Record 69, Record 92 and Record 75). The fountain from which any basis for the counterclaim of Finan, Inc., could ever emanate were the books and records of account of Finan, Inc.

#### SUMMARY OF THE ARGUMENT

The advisability of a compromise is determined by the District Court and the Referee in the exercise of a "sound judicial discretion."

A compromise will not be disturbed on Appeal unless the record reveals that the Court acted arbitrarily or not in the best interest of the bankrupt estate.

These propositions of law are well settled and govern this Appeal.



There is no dispute as to the essential facts upon this Appeal.

The Referee accepted a compromise of a \$56,201.61 debt due the bankrupt estate, for the sum of \$5,000.00.

The basis of the compromise was a counterclaim of \$61,084.61 by Finan, Inc., against the bankrupt. The Referee and the District Court never determined whether the counterclaim was a sham. Proof of that was contained in Finan, Inc.'s books of account. There was no examination of the books of Finan, Inc.

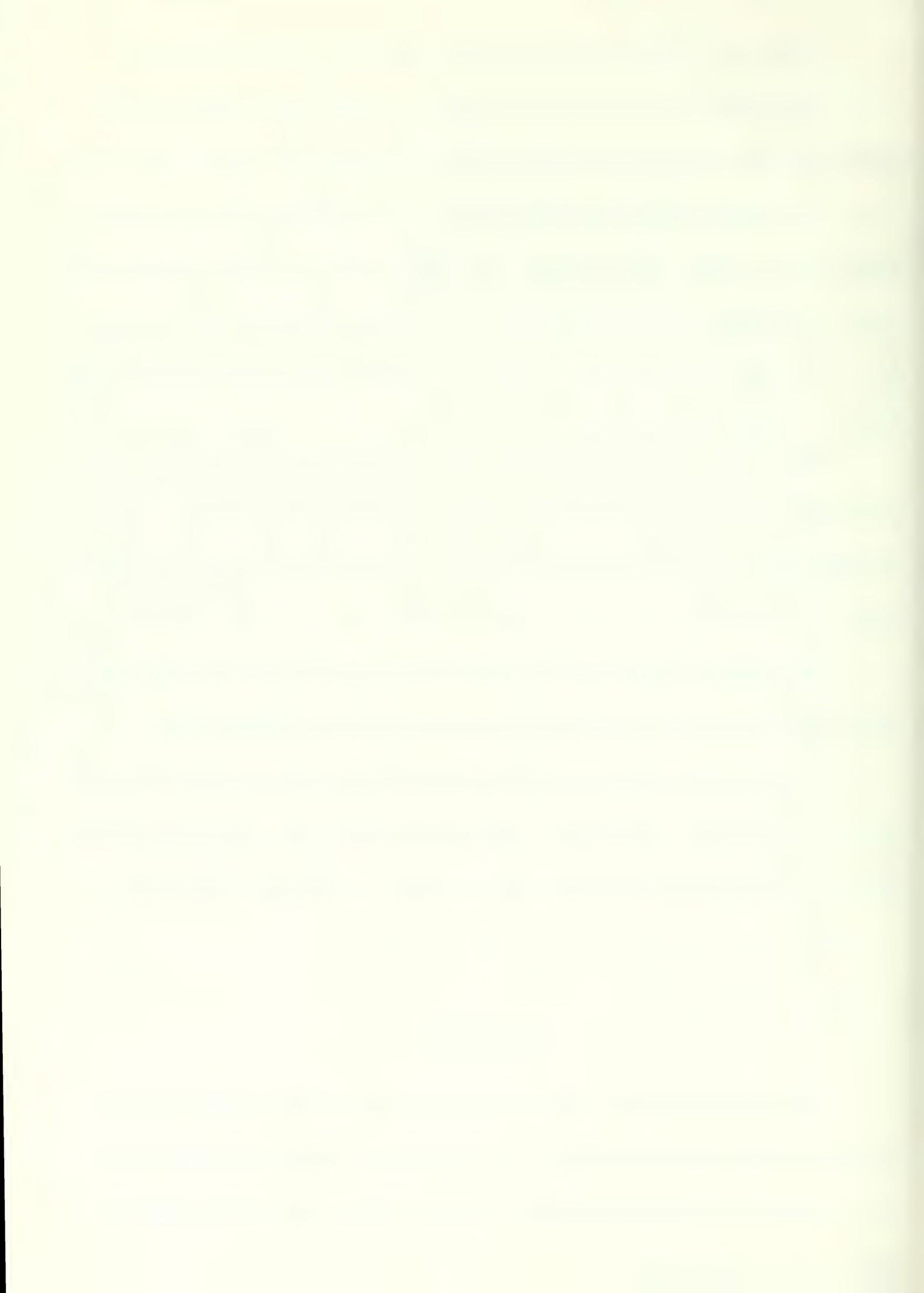
Acceptance of the token offer of \$5,000.00 was an arbitrary action, as a matter of law, until there was some evidence that Finan, Inc., had a counterclaim. Only the books of account of Finan, Inc., could show that fact.

The Referee acted blindly. Examination of the books of Finan, Inc., may in fact, positively confirm its \$56,201.61 debt to Weber, Inc.

This Court should remand this case with instructions to have the records of Finan, Inc., examined to determine whether the counterclaim is a sham, and for such further proper proceedings in connection therewith.

#### ARGUMENT

The Decision of the United States District Court for Hawaii was based upon the proceedings before the Referee in Bankruptcy (Clerk's Minutes, Record 92 and Record 63). Only argument was heard by the District Judge (supra, Record 92).



Accordingly, the proceedings before the Referee in Bankruptcy must be examined to determine whether there was error.

The issue on this Appeal is whether the compromise offer made by Finan, Inc., should have been accepted, in the exercise of a sound judicial discretion. The law involved in this Appeal is well settled.

Thus, as stated in 9 American Jurisprudence 2d, (Title, Bankruptcy) page 918, Section 1252:

"The approval of the court is a condition of the validity of a compromise. Ordinarily the wishes of the creditors prevail, but the court is, in the last analysis, responsible for the decision to be made.

"The advisability of a compromise is to be determined by the court exercising sound judicial discretion."

Accord: 8 B C.J.S., Section 621(e), pages 237 and 238.

And, numerous cases cited in footnotes.

Among the very important matters for a Court or a Referee to consider in accepting or rejecting a compromise, are the complexities of the litigation, the probabilities of success and the difficulties to be encountered.

Thus, as stated in 9 American Jurisprudence 2d (Title, Bankruptcy) page 918, Section 1253:

"Among the considerations addressed to the sound discretion of the court in acting upon a petition for the approval of a compromise settlement are the probability of success in the litigation, the difficulties which are likely to be encountered in the collection of a judgment if a judgment is obtained, the complexity of the litigation involved, the expense,



inconvenience, and delay attendant upon litigation, the paramount interest of the creditors, and the views which they express in reference to the advisability of a compromise."

Whether there will be any complexities is wholly unknown. Whether there is even any basis for the alleged counterclaim is wholly unknown. The advisability of accepting this compromise cannot be determined until it is known whether a basis for same actually exists.

THERE HAS BEEN NO EXERCISE OF JUDICIAL DISCRETION  
IN THIS CASE

Neither the Referee or the Trustee ever purported to have examined the books of Finan, Inc. Until this has been done it is utterly impossible for anyone to know whether the compromise offer should be accepted.

Only the books of Finan, Inc., (nothing else) would show whether there was a basis for accepting less than the amount owed Weber, Inc., to-wit, \$56,201.61.

There could be absolutely no exercise of any judicial discretion until that examination had been made. At that time, the records of Finan, Inc., may confirm that the \$56,201.61 is owed Weber, Inc.

Until the books of Finan, Inc., had been examined, all that the Referee or the District Court could do was engage in pure rank speculation. They were acting blindly. Engaging in speculation is not the exercise of judicial discretion. It is an abuse of discretion.



There is no great undertaking in checking a firm's books, and the entries therein. It is a routine matter. If there are any charges against Weber, Inc., as alleged by Finan, Inc., then the records of Finan, Inc., will reveal that fact. If the records fail to show any charges against Weber, Inc., then this is evidence that none exist.

The books are the fountain or source which, after examination, and only then, will determine whether there is even any issue or dispute involved in this case.

ACCEPTANCE OF THE COMPROMISE WAS ERROR AS A  
MATTER OF LAW

It is submitted that the Trustee's Petition for Leave to Compromise was totally insufficient, as a matter of law (Record 39 and Record 40). Because, the basis of the request in the Petition, was Exhibit "A". This Exhibit "A" was merely the request of the attorney for Finan, Inc., to try to obtain the compromise.

Exhibit "A" weakened Finan, Inc.'s claim that it even had any counter-claim.

Exhibit "A" was actually the red flag of warning to the Referee. In and of itself, it required and impelled the Referee to do more than accept the allegation of Finan, Inc., that it had a counterclaim. If Finan, Inc., had a \$61,084.61 counterclaim, it was unlikely that it would pay a bankrupt \$1.00, much less an additional \$5,000.00. Quite the contrary, it would be



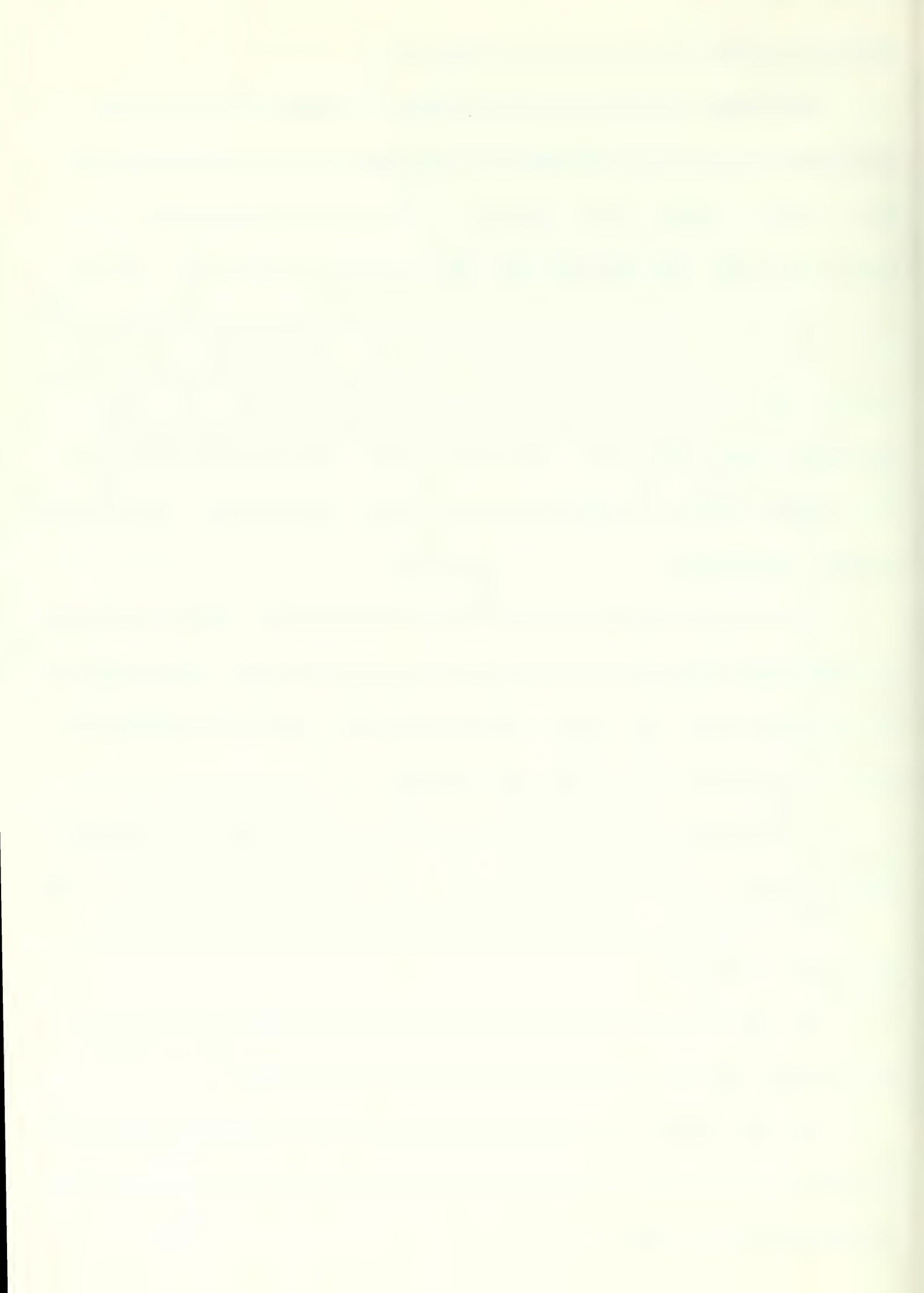
requesting payment of money from the bankrupt.

Especially is this true when the Affidavit attached to the Petition for Disallowance of the compromise is analyzed. Because, the Affidavit of H. R. Weber, formerly general manager for Weber, Inc., stated that Finan, Inc., had even admitted owing \$24,154.00 (Record 41-E). Furthermore, the Affidavit stated that the balance of the \$56,000.00 obligation could be proved and "established (1) through the books, records and accounts of the Bankrupt; (2) through the books, records and accounts of J. P. FINAN GENERAL CONTRACTOR, INC.; (3) by subpoenaing the accountant for said J. P. FINAN GENERAL CONTRACTOR, INC. and his office records with respect to said subcontracts."

The allegations of this Affidavit were not disputed. Since the Trustee and the Referee had never examined the books of Finan, Inc., they could not know whether Finan, Inc., even had a counterclaim, much less whether the amount was \$1.00, \$5.00 or any other amount.

Furthermore, there were other circumstances to compel an examination before the compromise offer of Finan, Inc., was even considered, as follows:

- (1) Finan, Inc., had never set forth any basis whatsoever for its alleged counterclaim;
- (2) Finan, Inc., had resisted (successfully) all efforts to require it to reveal a basis for its alleged counterclaim (Record 68);
- (3) The Affidavit of H. R. Weber, then before the Referee, specifically showed that Finan, Inc., "has admitted that it owes the bankrupt \$24,154.00 on the subcontracts only";



(4) Finally, since the Appellant had even offered to pay the cost of the examination of the books of Finan, Inc. (Affidavit of Helen Weber, Record 69), there was no basis or excuse for the Referee's arbitrary refusal to make an examination. No one could have been harmed by the examination (except that the records of Finan, Inc., could positively repudiate its alleged counterclaim). The circumstances demanded that an examination be made before the compromise offer was accepted.

Under these facts, acceptance of the compromise was a clear abuse of discretion.

If the Trustee had set forth in the Petition for Leave to Compromise, as his Exhibit "A", extracts or facsimile copies from Finan, Inc.'s books of account, a far different case would be before this Court. The Referee would then have had a basis upon which to exercise a reasonable discretion.

However, the mere claim, or allegation, by Finan, Inc., that it had a counterclaim in this case was not a proper basis for acceptance of a compromise regardless of the amount offered. An "allegation" is not "proof."

This Court has held that a "primary purpose" of a compromise, is to avoid the necessity of determining sharply contested issues.

California Assoc. Prod. Co. vs. Wil-Rud Corp. vs. Lynch, et al (9th CCA, 1950), 183 F2d 946, and cases cited page 949, Note 6.

Accord: Kaufman-Brown Potato Co. vs. Long (9th CCA, 1950), 182 F2d 594, 597.

See also: In Re Power Eng. Co. vs. Chatham Bank (7th CCA, 1949), 177 F2d 240.

In the case at bar the Referee, and the District Court were never in



a position to know whether any real dispute existed. They never progressed beyond the mere allegations of Finan, Inc., that it had a counterclaim.

Until some evidence or proof of the existence of a counterclaim was brought forth, the Referee could not know if a real controversy existed. Proof thereof was contained in Finan, Inc.'s books. No one ever saw the books. Examination may positively show that no controversy exists, because Finan, Inc.'s records may confirm its debt to Weber, Inc.

### CONCLUSION

It is conceded that the Referee and the District Court have a very wide discretion. However, this Court will act where the record shows, as in this case, that the action of the Referee was arbitrary and not in the best interest of the bankrupt's estate.

There has not been any exercise of judicial discretion in this case. The Referee acted blindly. When the Referee accepted Finan, Inc.'s compromise offer he did not have sufficient proof to be able to exercise a judicial discretion. If Finan, Inc.'s books prove it owes Weber, Inc., \$56,201.61, the compromise offered by Finan, Inc., should not be accepted. Finan, Inc.'s records may positively prove that fact. There is not sufficient information to be able to make a proper judicial determination of that fact.

Under these facts, Appellant's request for an examination of the books of Finan, Inc., was a reasonable and proper request. It was essential in order for the Referee to be able to make and to exercise a proper judicial



decision.

Therefore it is respectfully requested that this Honorable Court remand this case with instructions for further proceedings herein, (1) to determine if there is any basis for the alleged counterclaim of Finan, Inc., in this case, or a sham, (2) subpoena or otherwise make an examination of the books of Finan, Inc., in order to determine whether a compromise of the \$56,201.61 debt should be accepted or rejected, and (3) such further proceedings as may be necessary and in the best interest of the bankrupt's estate.

8 B C.J.S. (Title, Bankruptcy), Section 622, pages 240 and 241, and many cases cited.

The foregoing is all that the Appellant requests in this case, simply a remand with these instructions.

DATED, Honolulu, Hawaii, this 14th day of October 1968.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "JOHN E. PARKS". The signature is somewhat stylized and cursive.

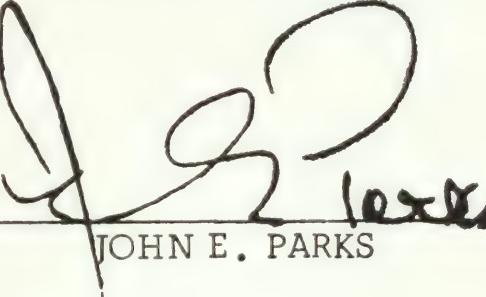
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JOHN E. PARKS  
Attorney for Helen Weber, Appellant



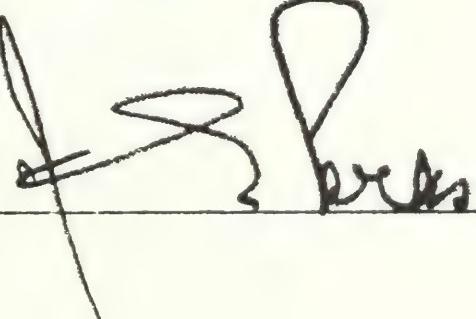
CERTIFICATE

I certify that, in connection with the preparation of this Appellant's Opening Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellant's Opening Brief is in full compliance with those rules.



JOHN E. PARKS

I also certify that I have delivered three copies of the within Appellant's Opening Brief to the office of Leslie T. Bennett, Attorney for J. P. Finan General Contractor, Inc., and three copies of the Appellant's Opening Brief to Hiroshi Sakai, Attorney for Ralph Aoki, Trustee in Bankruptcy.





NO. 22770

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HELEN WEBER,

Appellant,

vs.

RALPH AOKI, TRUSTEE,

Appellee.

FEB 26 1969

APPELLANT'S ANSWERING BRIEF

FILED

JAN 13 1969

WM. B. LUCK, CLERK

HIROSHI SAKAI 406  
909 City Bank Building  
610 Richards Street  
Honolulu, Hawaii 96813

Attorney for Appellee



CITATIONS	ii
JURISDICTION	1
STATEMENT OF THE CASE	2-7
QUESTIONS PRESENTED	9
ARGUMENT	9-12
I. THIS COURT HAS NO JURISDICTION OVER THE APPELLANT'S APPEAL FILED HEREIN.	9
II. THE ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE REFEREE IN BANKRUPTCY AND THE ORDERS OF THE UNITED STATES DISTRICT COURT SHOW NO CLEAR ERROR AND ABUSE OF DISCRETION.	12
III. APPELLANT IS NOT A "PERSON AGGRIEVED" UNDER THE BANKRUPTCY ACT.	12
CONCLUSION	13



CITATIONS

Farmer Brothers Company vs Middle Enterprises, Inc. (C.C.A. 9 1966) 366 F.2d 143	12
Florida Trailer & Equipment Co. vs Deal (C.C.A. 5 1960) 284 F.2d 567	12
Fowler vs Smisser (C.C.A. 10 1960) 274 F.2d 335, cert. den. 362 U.S. 988, 80 S.Ct. 1076, 4 L.Ed. 2d 1022	2, 10
Hoppe vs Rittenhouse (C.C.A. 9 1960) 279 F.2d 3	12
In re American Textile Printers Co., (no. 22-1187) 152 F. Supp. 901	2, 10
In re Knollhoff (D.C. Kan. 1965) 239 Fed. Supp. 927	12
In re Sunningdale Country Club, (C.C.A. 6 1965) 351 F.2d 139	12
In re Wright (D.C. Mo. 1965) 247 F. Supp. 648	2, 10
Mintz vs Lester (C.C.A. 10, 1938), 95 F. 2d 590	10
United States vs Gallagher (C.C.A. 9 1945) 151 F.2d 556	2, 11
Washington vs Houston Lumber Company (C.C.A. 10, 1962)	12
Wayne United Gas Company vs Owens-Illinois Glass Company (1937) 300 U.S. 131, 57 S.Ct. 382, 81 L.Ed. 557	1, 9, 10
11 U.S.C. Sec. 67	12
Rule 73(g) of the Federal Rules of Civil Procedure	2, 10



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN WEBER,

Appellant,

vs.

RALPH AOKI, TRUSTEE,

Appellee.

APPELLEE'S ANSWERING BRIEF

JURISDICTION

Appellant has filed a Notice of Appeal on January 18, 1968 (R. 79) to two orders denying rehearings on November 21, 1967 (R. 71) and on December 27, 1967 (R. 78) and moved for an extension of time on February 27, 1968 extending the time for filing of the records on appeal and the docketing of the appeal to March 18, 1968 (R. 81). No further extensions were sought or granted by or to the Appellant and the appeal was docketed on April 17, 1968.

This Court does not have jurisdiction over this appeal because the orders of November 21, 1967 and December 27, 1967 respectively which denied the Petitions for Rehearing are not appealable.

Wayne United Gas Company vs Owens-Illinois  
Glass Company (1937) 300 U.S. 131, 57 S.Ct.  
382, 81 L.Ed. 557.



Fowler vs Snisser, (C.C.A. 10 1960) 274 F.2d 335, cert. den., 362 U.S. 965, 80 S.Ct. 1076, 4 L.Ed. 2d 1022.

In re Wright, (D.C. Mo. 1965) 247 F. Supp. 648.

In re American Textile Printers Co., (D.C. N.J. 1957) 152 F. Supp. 901.

This Court has no jurisdiction over the appeal since the docketing of the appeal was not completed in accordance with Rule 73(g) of the Federal Rules of Civil Procedure. The docketing of the appeal was made on April 17, 1968 which was thirty days after the expiration of the time for the docketing of the appeal.

Rule 73(g) Federal Rules of Civil Procedure,  
U.S. vs Gallagher (C.C.A. 9 1945) 151 F.2d 556.

#### STATEMENT OF THE CASE

The Appellee does not accept the Appellant's Statement of the Case as stated and sets forth the following facts which are pertinent to this appeal.

The Order of the Referee in Bankruptcy approving the Trustee's Petition for Compromise was filed with the United States District Court of Hawaii on April 20, 1967 (R. 42).

The Findings of Fact and Conclusions of Law (R. 52) was filed by the Referee in Bankruptcy on July 12, 1967, sine pro tunc as of April 20, 1967. After having heard the evidence at hearings held on April 6 and 18, 1967 and considering the same, he sets forth the following findings:

"1. The Trustee, Ralph S. Aoki, is the duly appointed



and qualified, acting Trustee of the above named Bankrupt as of November 1, 1966.

2. That the Petition for Intervention in Civil No. 19448, First Judicial Circuit Court, State of Hawaii, Weber Trucking and Equipment Rental, Inc. vs. J. P. Finan General Contractor, Inc., Defendant and Communication Satellite Corporation and First National Bank of Hawaii, Garnishees, was filed on January 16, 1967 in which the substitution of the Trustee in place of the Bankrupt as Plaintiff was approved by John E. Parks, counsel for Weber Trucking and Equipment Rental, Inc.

3. That on January 16, 1967 an Order Granting Leave for the Trustee Ralph S. Aoki to intervene and be substituted in place of the Bankrupt in aforesaid Civil No. 19448 was approved by William B. Cobb the Referee in Bankruptcy.

4. That on March 21, 1967 the Petition for Leave to Compromise Claim was filed in the United States District Court for the District of Hawaii in which the Trustee requested the compromise of the above described action which was filed on June 24, 1966 for the total sum of \$56,201.61 by Weber Trucking and Equipment Rental, Inc. and the Answer and Counterclaim of \$61,084.61 was filed on July 15, 1966 by the Defendant J. P. Finan General Contractor, Inc.

5. That in said Petition for Leave to Compromise Claim there was attached thereto a letter addressed to the Trustee Ralph S. Aoki dated March 20, 1967, the offer by J. P.



Finan General Contractor, Inc. without prejudice the sum of \$5,000.00 as a compromise settlement of Civil No. 19448.

6. That Petition for Disallowance of Claim Against J. P. Finan General Contractor, Inc. was filed on April 4, 1967 by the President and sole stockholder of Bankrupt.

7. That there was no creditor who appeared at the hearings on April 6 and 18, 1967 to object to the granting of the Trustee's Petition for the Compromise of the Claim of the Bankrupt against J. P. Finan General Contractor, Inc. for the total sum of \$5,000.00 notwithstanding the fact that the notice of the hearing was given to all creditors dated March 24, 1967 and scheduled for the first hearing on April 6, 1967.

8. The Trustee Ralph S. Aoki testified that he had reviewed the action which was filed by the Bankrupt against the Defendant J. P. Finan General Contractor, Inc. and a series of meetings were held with both J. P. Finan General Contractor, Inc. and Roy Weber, General Manager, of Weber Trucking and Equipment Rental, Inc. and that based on the meetings and review of the files he has recommended the approval of the compromise of the claim.

9. The Trustee testified that the extras and additional work claimed by Bankrupt were not claimed and approved as required by the terms of the contracts and the complex litigation that was involved and expense that would be necessary to litigate this matter and the uncertainty of the result and the cost of litigation as well as the existence of the unsettled questions of



liability were factors in arriving at the request for the compromise.

10. J. P. Finan, President of J. P. Finan General Contractor, Inc. testified as to his company's defense to the suit in the State Court by the Bankrupt and in support of the back charges and other monies advanced by him on the Bankrupt's behalf during the work called for by the contracts; that J. P. Finan's testimony was supported by V. Rex Clay and Robert C. Kerley, CPA's, accountants for J. P. Finan General Contractor, Inc. who testified that books and records of the company supported the counterclaim of the Company against the Bankrupt.

11. That the matter of the detailed examination of all of the books and records of the general contractor together with the examination of the contracts, extras, additional work and back charges would result in a trial of the case with the attendant expense of such litigation in which the success of the Trustee is in doubt."

The Referee further set forth the following Conclusions of Law:

"1. That the Trustee Ralph S. Aoki is authorized under the provisions of 11 U. S. C. A. Sec. 52 to enter into the compromise of any controversy with the approval of the Court.

2. That the Trustee Ralph S. Aoki with the approval of the Referee in Bankruptcy was permitted to intervene and be substituted for the Bankrupt as party plaintiff with the consent



of the Bankrupt through its attorney in Civil No. 19448 which action was filed in the First Judicial Circuit Court of the State of Hawaii on June 24, 1966 by the bankrupt as party plaintiff.

3. That the Petition for Disallowance was not filed by a creditor but was filed by the President and sole stockholder of the Bankrupt through its attorney John E. Parks.

4. That the Trustee in determining the advisability of the compromise has the right to take into account the uncertainty and cost of litigation as well as the existence of the unsettled questions of liability in view of the claim and counterclaim which was filed in Civil No. 19448.

5. That the litigation in the above entitled case would result in the Trustee and his attorney spending considerable time in the proof of claims the liability of the entire claims not being clearly established and the respective back charges and other counterclaim being made by J. P. Finan General Contractor, Inc.

6. That by virtue of his substitution as party plaintiff in Civil No. 19448 (Hawaii State Court) in place of the Bankrupt and with the consent of the Bankrupt, the Trustee is thereby empowered to decide whether such case is to be litigated or settled subject only to the approval of this Court.

7. That based on the evidence and the hearings that it would be advisable and prudent to accept the compromise proposal offered by J. P. Finan General Contractor, Inc. and the



Trustee and that the compromise proposal be approved and the Trustee authorized to enter into a stipulation for the dismissal of the action and counterclaim.

8. That the Petition for Approval of the Compromise in Civil No. 19448 of the First Judicial Circuit Court, State of Hawaii, for \$5,000.00 be approved and that the Order Allowing the Compromise be entered in which the Trustee will be authorized to enter into the Stipulation for Dismissal."

The Petition for Review from the Order of the Referee in Bankruptcy was filed by Appellant as the President and the sole stockholder of Weber Trucking and Equipment Rental, Inc. (R. 45).

On September 18, 1967 the Honorable Martin Pence entered an Order denying the Petition for Review filed by the Appellant. (R. 60). In said Order Judge Pence made the following finding:

"The Court finds that the counsel for the Petitioner Helen Weber was given every opportunity at the two hearings before the Referee to go into all of the details of the proposed compromise; that the Referee was satisfied that the compromise should be approved; that the Petitioner Helen Weber had the burden to show that the action of the Referee was clearly erroneous; that Petitioner has shown nothing and stated nothing to the Court to show that the action of the Referee was clearly erroneous; that the evidence before this Court and that which was before the Referee compels this Court to find that the Referee's Conclusions based on his Findings of Fact were not completely erroneous all as more fully set out in the oral decision in the record herein."



Judge Pence further ordered as follows:

"1. That the Order of the Referee in Approving the Trustee's Petition for Compromise on April 20, 1967 be and it hereby is affirmed.

"2. That the Petition for Review filed herein be and the same is hereby denied.

"3. That the Motion for Dismissal of the Referee's Findings of Fact and Conclusions of Law filed herein on July 13, 1967 nunc pro tunc as of April 20, 1967 be and the same is hereby denied."

The Appellant did not file a Notice of Appeal from the Order of the District Court. Instead of filing the Notice of Appeal, the Appellant on September 26, 1967 filed her first Petition for Rehearing (R. 64) and on November 21, 1967 the Honorable C. Nils Tavares entered an Order denying the first Petition for Rehearing (R. 71). The Order was made after the Court considered the Petition for Rehearing and the record and the argument of the counsel for Appellant and Appellee.

On November 29, 1967 the Appellant filed a Second Motion for Rehearing (R. 73) and on December 27, 1967 the Honorable Martin Pence denied the Second Motion for Rehearing and entered a ruling on the Motion for Rehearing (R. 78).

The Appellant then filed a Notice of Appeal on January 18, 1968 from the Order Denying the First Petition for Rehearing filed on November 21, 1967 and from the ruling on the Second Motion for Rehearing filed on December 27, 1967 (R. 79).



QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to hear this appeal when the appeal was from the two orders denying petitions for rehearing by the Appellant?
2. Whether this Court has jurisdiction when the Appellant has failed to docket her appeal in compliance with Rule 73(g) of the Federal Rules of Civil Procedure?
3. Whether an appeal lies from an Order, Findings of Fact and Conclusions of Law of the Referee in Bankruptcy affirmed by the United States District Court when there has been no showing of clear error and abuse of discretion?
4. Whether the Appellant is a "person aggrieved" under the Bankruptcy Act?

ARGUMENT

I. THIS COURT HAS NO JURISDICTION OVER THE APPELLANT'S APPEAL FILED HEREIN.

As the records show, the Notice of Appeal was filed on behalf of the Appellant on January 18, 1968 (R. 79) from the two orders denying the rehearing request of the orders entered by the United States District Court of Hawaii affirming the Referee's ruling on September 18, 1967 (R. 60). The appeal period of sixty days from the Order of September 18, 1967 expired on November 18, 1967.

The United States Supreme Court in order to resolve a conflict between circuits granted certiorari in Wayne United



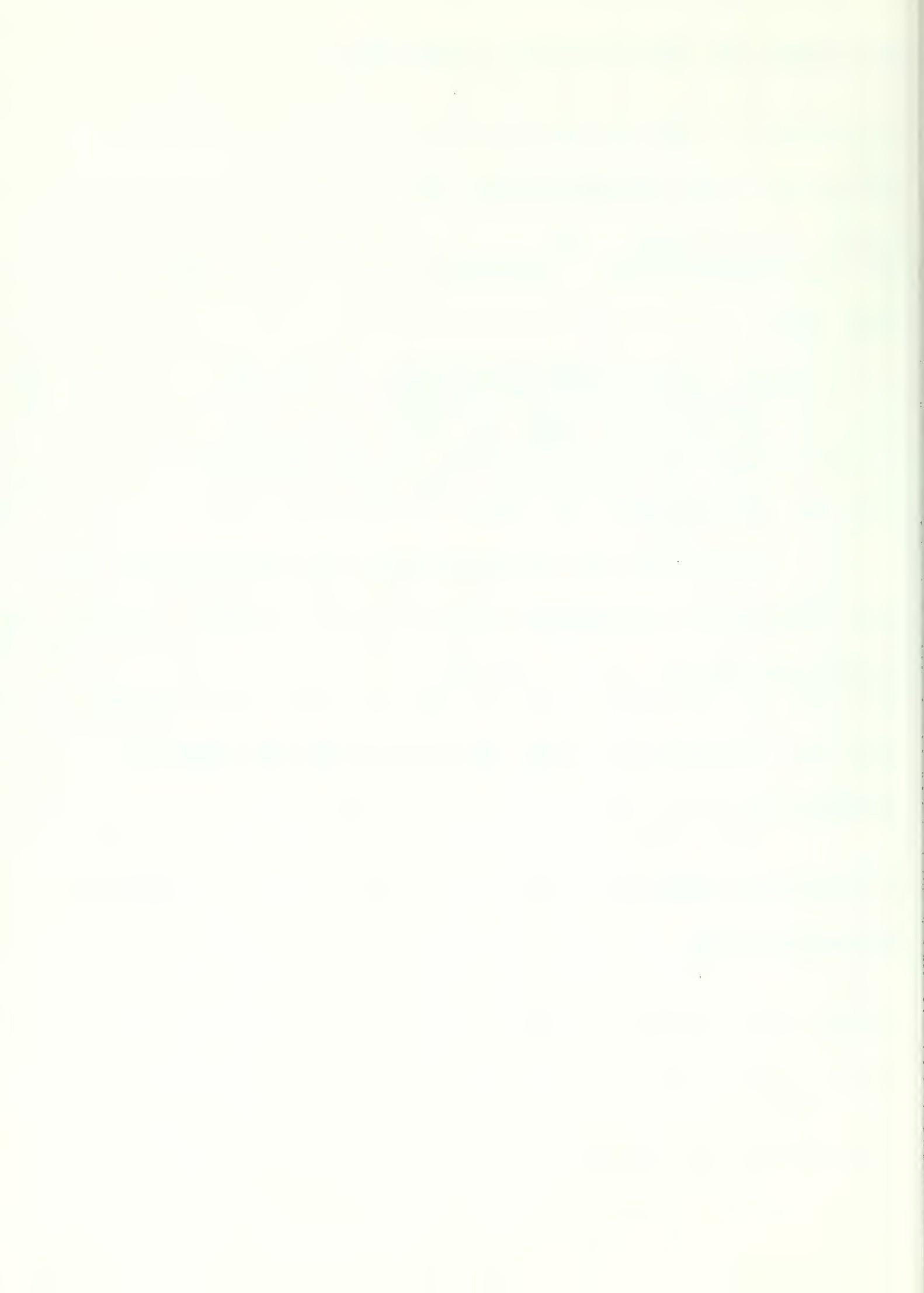
Gas Company vs Owens-Illinois Glass Company (1937), 300 U.S. 131, 57 S.Ct. 382, 81 L.Ed. 556 to declare that a district court could in its discretion rehear a cause even after the expiration of the period allowed by the bankruptcy act for appeal from the order disposing of the matter in controversy. The Supreme Court said in the Wayne United Gas Company case on Page 137:

"The defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing takes the risk that he may lose his right of appeal, as the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal."

The ruling of the Wayne United Gas Company case has been followed by subsequent decisions in the Federal Courts. Fowler vs Smisser, (C.C.A. 10 1960) 274 F.2d 335, cert. den. 362 U.S. 988, 80 S.Ct. 1076, 4 L.Ed. 2d 1022, In re Wright, (D.C. Mo. 1965) 247 F. Supp. 648, In re American Textile Printers Co., (D.C. N.J. 1957) 152 F. Supp. 901.

The appeal time may not be extended by the device of appealing from the ruling on the petition for a rehearing. Mintz vs Lester (C.C.A. 10 1938) 95 F.2d 590.

The Appellant in this case had extended the docketing period which expired on March 18, 1968 and finally docketed her appeal thirty days later on April 17, 1968 without any extension filed. Under Rule 73(g) of the Federal Rules of Civil Procedure it is provided as follows:



"The record on appeal as provided for in Rule 75 and 76 shall be filed with the Appellate Court and the appeal there docketed within forty days from the date of filing the Notice of Appeal; except that, when more than one appeal is taken from the same judgment to the same Appellate Court, the district court may prescribe the time for filing and docketing, which in no event shall be less than forty days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than ninety days from the date of filing the first notice of appeal."

In United States vs Gallagher (C.C.A. 9 1945) 151

F.2d 556 the Notice of Appeal was filed on March 21, 1945 and on April 30, 1945 before the expiration of the forty day period within which the record on appeal must be filed under Rule 73(g) of the Federal Rules of Civil Procedure, the District Court made an order extending the time for filing the record to May 21, 1945 and the record was not filed on May 21, 1945. On May 31, 1945 ten days subsequent to May 21, 1945 the Circuit Court of Appeals by an Order extended the time for the filing of the record on to June 16, 1945. The Court held that the extension of the time for docketing of the record on appeal was held to be invalid.

This Court has no jurisdiction over the appeal since the Appellant docketed her appeal thirty days after the expiration of the time for the docketing of the appeal.



II. THE ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE REFEREE IN BANKRUPTCY AND THE ORDERS OF THE UNITED STATES DISTRICT COURT SHOW NO CLEAR ERROR AND ABUSE OF DISCRETION.

The decision of the Referee in Bankruptcy as to the approval or disapproval of a compromise agreement rests upon sound discretion which is reviewable by the district judge but will normally not be set aside except where there is a plain error or abuse of discretion and after affirmance of the Referee's approval by the district court, the order will not be reversed unless discretion has been abused. Florida Trailer & Equipment Co. vs Deal, (C.C.A. 5 1960) 284 F.2d 567.

The Federal District Court and the Court of Appeals are required to accept the Findings of the Referee in Bankruptcy unless such Findings are clearly erroneous. Farmer Brothers Company vs Huddle Enterprises, Inc. (C.C.A. 9 1966) 366 F.2d. 143. See also Washington vs Houston Lumber Company (C.C.A. 10 1962) 310 F.2d. 881; Hoppe vs Rittenhouse, (C.C.A. 9 1960) 279 F.2d. 3; In re Knollhoff, (D.C. Kan. 1965) 239 Fed. Supp. 927.

III. APPELLANT IS NOT A "PERSON AGGRIEVED" UNDER THE BANKRUPTCY ACT.

A person who was a general creditor and former officer and shareholder of bankrupt corporation was not a "person aggrieved" under 11 U.S.C. Sec. 67 and entitled to seek review of the referee in bankruptcy's order. In re Sunningdale Country Club, (C.C.A. 6 1965) 351 F.2d 139.



CONCLUSION

For the foregoing reasons it is respectfully  
requested that the Appellant's appeal be dismissed.

Dated: Honolulu, Hawaii, this 10th day of January,  
1969.

Respectfully submitted,

Hirosi Sakai  
HIROSHI SAKAI  
Attorney for RALPH AOKI,  
Appellee



CERTIFICATE

I certify that, in connection with the preparation of this Appellee's Answering Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Appellee's Answering Brief is in full compliance with those rules.

Hirosaki  
HIROSHI SAKAI

I also certify that I have delivered three copies of the within Appellee's Answering Brief to the office of Leslie T. Bennett, Attorney for J. P. Finan General Contractor, Inc., and three copies of the Appellee's Answering Brief to John E. Parks, Attorney for Helen Weber, Appellant.

Hirosaki  
HIROSHI SAKAI



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD EUGENE QUALIN, )  
Appellant, )  
vs. )  
UNITED STATES OF AMERICA )  
Appellee. )

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No. 22765  
**22772**

FILED

OCT 22 1968

APPELLEE'S BRIEF

WM. B. LUCK, CLERK

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

EDWIN L. MILLER, JR.  
United States Attorney

SHELBY R. GOTTF  
Assistant U. S. Attorney

325 West "F" Street  
San Diego, California 92101

Attorneys for Appellee,  
United States of America



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD EUGENE QUALIN,                          )  
    )  
    Appellant,                                      )  
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vs.     )  
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UNITED STATES OF AMERICA                      )  
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## TOPICAL INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	3
V ARGUMENT	5
A. SUFFICIENCY OF THE EVIDENCE	5
B. THERE IS NO ISSUE OF ENTRAPMENT	6
VI CONCLUSION	8



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Cellino v. United States, 276 F. 2d 941 (9th Cir 1960)	7
Evans v. United States, 257 F. 2d 121 (9th Cir. 1958), cert. denied, 358 U. S. 866	6
Glasser v. United States, 315 U. S. 60 (1942)	5
Grant v. United States, 291 F. 2d 746 (9th Cir. 1961) cert. denied, 368 U. S. 999, 1962	7
Hadley v. United States, 18 F. 2d 507 (8th Cir. 1927)	7
Ortiz v. United States, 358 F. 2d 107 (9th Cir. 1956)	8
Ramirez v. United States, 294 F. 2d 277 (9th Cir. 1960)	7
United States v. Becker, 62 F. 2d 1007, 1008 (2nd Cir. 1933)	7
Young v. United States, 286 F. 2d 13, 15 (2nd Cir. 1960)	8
<u>Statutes</u>	
Title 18, United States Code, Section 5010 (b)	2
Title 18, United States Code, Section 5017 (c)	2
Title 18, United States Code, Section 5010 (e)	2
Title 21, United States Code, Section 176 (a)	6
Title 21, United States Code, Section 3231	1
Title 28, United States Code, Section 1291 and 1294	1



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD EUGENE QUALIN,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

)  
)  
)  
)  
)

No. 22765

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant, Edward Eugene Qualin to be guilty of both counts of a two-count indictment, following a non-jury trial. [C. T. 15]<sup>1</sup>.

The offenses occurred in the Southern District of California. The District court had jurisdiction by virtue of Title 21, United States Code, Section 3231 and Title 21, United States Code, Section 176 (a). Jurisdiction of this court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

---

<sup>1</sup>"C. T." refers to Clerk's Transcript.



## STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California at San Diego, California on September 13, 1967. [C. T. 2-3] .

The first count alleged that appellant, with intent to defraud the United States, knowingly imported eighty pounds of marihuana into the United States from Mexico, contrary to law. [C. T. 2] .

The second count alleged that appellant, with intent to defraud the United States, knowingly concealed and facilitated the transportation and concealment of eighty pounds of marihuana which, as the defendant then and there well knew, had been imported and brought into the United States contrary to law. [C. T. 3] .

Non-jury trial of appellant commenced on October 26, 1967 and on that same day appellant was found guilty before then United States District Judge James M. Carter. [C. T. 14, 15] .

On the same date, October 26, 1967, appellant was committed to the custody of the Attorney General for a sixty day study under Title 18, United States Code, Section 5010 (e). [C. T. 17] .

On January 15, 1968, Judge Carter committed appellant to the custody of the Attorney General for treatment and supervision pursuant to Title 18, United States Code, Section 5010 (b) (Federal Youth Corrections Act) until discharged by the board of parole as provided in Title 18, United States Code, Section 5017(c) on counts one and two to run concurrent. [C. T. 19] .

<sup>2</sup>"R. T." refers to the Reporter's Transcript on Appeal.



Subsequently, on January 22, 1968, appellant filed a notice of appeal. [C. T. 20].

III.

ERROR SPECIFIED

1. The court erred in finding the appellant guilty of both counts because there was insufficient evidence to show appellant had knowledge of the contents of the automobile.
2. There was entrapment as a matter of fact.

IV.

STATEMENT OF THE FACTS

On August 9, 1967, at 7:00 a. m., appellant entered the United States from Tijuana, Mexico as the driver of an El Camino Chevrolet pickup truck. [R. T. 23-24]<sup>2</sup>.

Appellant appeared to Customs Inspector Cruickshank to have been "dopey or drinking or something." Appellant stated he had not been drinking. [R. T. 23].

Inspector Cruickshank found 38 bricks of marihuana in the bottom and side panels of the truck bed. [R. T. 24-25]. The truck was registered to Donald P. Harris. [R. T. 26]. Appellant told the officer it was Harris's car before the marihuana was found [R. T. 28]. Cruickshank smelled no alcohol. Appellants eyes were half shut. [R. T. 28].



The vehicle was on the "lookout" list and had been for one or two days. [R. T. 34].

Appellant declared he was bringing nothing from Mexico. [R. T. 43].

Jackie Ray Bailes testified he provided information to Customs Agent Spohr concerning the truck. He knew appellant and Don Harris, the owner of the truck. [R. T. 49].

After the information was provided to Spohr and before appellant's arrest, Bailes had a conversation with Harris and pointed out appellant. [R. T. 53-54].

Bailes and appellant had a conversation in the jail in August or September. Appellant said that he had changed his mind, then he figured he had better go ahead and do it. [R. T. 55].

Appellant's counsel agreed with the court there was no issue of entrapment. [R. T. 58].

Appellant told Agent Spohr after being advised of his rights, that he had known Don only two days, that Don had loaned him some money for a motel for him and his girl friend, and that upon deciding to go to San Diego he asked to borrow Don's car. Don told him the car was parked across from the Chicago Club in Tijuana. A Mexican man with a moustache gave him the keys to Don's truck. He was to leave the truck at Fifth and "G" in San Diego. He left the girl friend situated in the motel, but wasn't certain of her name and address, but thought she lived in Pacific Beach. [R. T. 61-62].



Trial counsel for appellee stated to the court the government would rely principally on possession. [R. T. 65].

V.

ARGUMENT

A. SUFFICIENCY OF THE EVIDENCE.

It is well settled that on appeal the facts are to be interpreted most favorable to the government.

Glasser V. United States, 315 U. S. 60 (1942).

It is clear that appellant, as the sole occupant, drove the truck into the United States from Tijuana containing 38 bricks of marihuana.

The only question is knowledge. Did he know the marihuana was in the truck when it entered the United States?

Appellant would expect the court to believe he was to drive the truck from Tijuana to San Diego for one hundred dollars without knowing what the truck contained. The owner, Harris, had only been known to appellant two days. From the record, it appeared he borrowed the truck from Harris on the "spur of the moment." Harris surely doesn't keep his truck sitting on the streets of Tijuana loaded with marihuana waiting for someone to ask to borrow his truck.

The court was advised by appellee's trial counsel for appellee, the government would rely on possession. [R. T. 65] .

The statutory presumption reads as follows:

"Whenever on trial for a violation of this subsection, the defendant is



shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 21, United States Code, Section 176(a), (second paragraph).

In this case, there is no question as to possession. Was it a knowing possession? Since jury was waived, Judge Carter became the finder of fact. In finding appellant guilty, he surely found knowledge.

Actual possession is a potent circumstance from which to infer knowledge.

Evans v. United States, 257 F. 2d 121 (9th Cir 1958), (Cert. Den. 358 U. S. 866).

This is particularly true, where there is such a large quantity of marihuana.

#### B. THERE IS NO ISSUE OF ENTRAPMENT

Appellant did not preserve the issue of entrapment on appeal. In fact, appellant conceded there was no issue of entrapment.

The following took place during the trial upon direct examination of Jackie Bailes, the informant. [R. T. 58]

Q. (by Mr. Gott) And what information did you receive?

A. (by Mr. Bailes) At that time. . .

Mr. Harr: I will object to that, your Honor, as hearsay.

The Court: It can only be admissible on the issue of probable cause. The car was stopped at the border.

Mr. Gott: I agree that border cases don't require probable cause, but I



m under the impression that based upon questions the Court and counsel  
sked, there may be an issue of entrapment here, and I do feel that---

The Court: There's no issue of entrapment.

Mr. Horn: No.

The Court: All right.

The defense of entrapment may not be raised for the first time on appeal.

Ramirez v. United States, 294 F.2d 277 (9th Cir. 1960).

Grant v. United States, 291 F.2d 746 (9th Cir. 1961).

Cert. den. 368 U. S. 999, 1962.)

In Cellino v. United States, 276 F.2d 941 (9th Cir. 1960),

where the appellant and his attorney were told that the judge knew they did not want an instruction on entrapment and no exception was taken, the issue would not be decided on appeal.

Assuming the points were preserved, there is no entrapment. Willingness to commit the acts, as evidenced by ready complaisance negates a claim of entrapment.

United States v. Becker, 62 F.2d 1007, 1008 (2nd Cir. 1933). Assuming knowledge, as found by the court, appellant stood ready to commit the acts charged.

There need not be evidence that agents have knowledge of illegal activities before they approach a suspect.

Hadley v. United States, 18 F.2d 507 (8th Cir. 1927). This would amount to giving the peddler "one free shot" before he could be convicted.



Young v. United States, 286 F. 2d 13, 15 (2nd Cir. 1960). Appellant's

defense is apparently lack of knowledge. The defense of entrapment is generally unavailable to one who denies committing the crime.

Ortiz v. United States, 358 F. 2d 107 (9th Cir. 1956).

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.  
United States Attorney

SHELBY R. GOTTF  
Assistant U. S. Attorney

Attorneys for Appellee,  
United States of America



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT,  
Assistant United States Attorney



22772

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD EUGENE QUILLEN, } NO. 1681 Criminal  
Appellant, }  
VS. }  
UNITED STATES OF AMERICA, } AUG 16 1968  
Appellee. }  
\_\_\_\_\_  
RECEIVED - MAILING DEPT.

THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS  
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Appellant, )  
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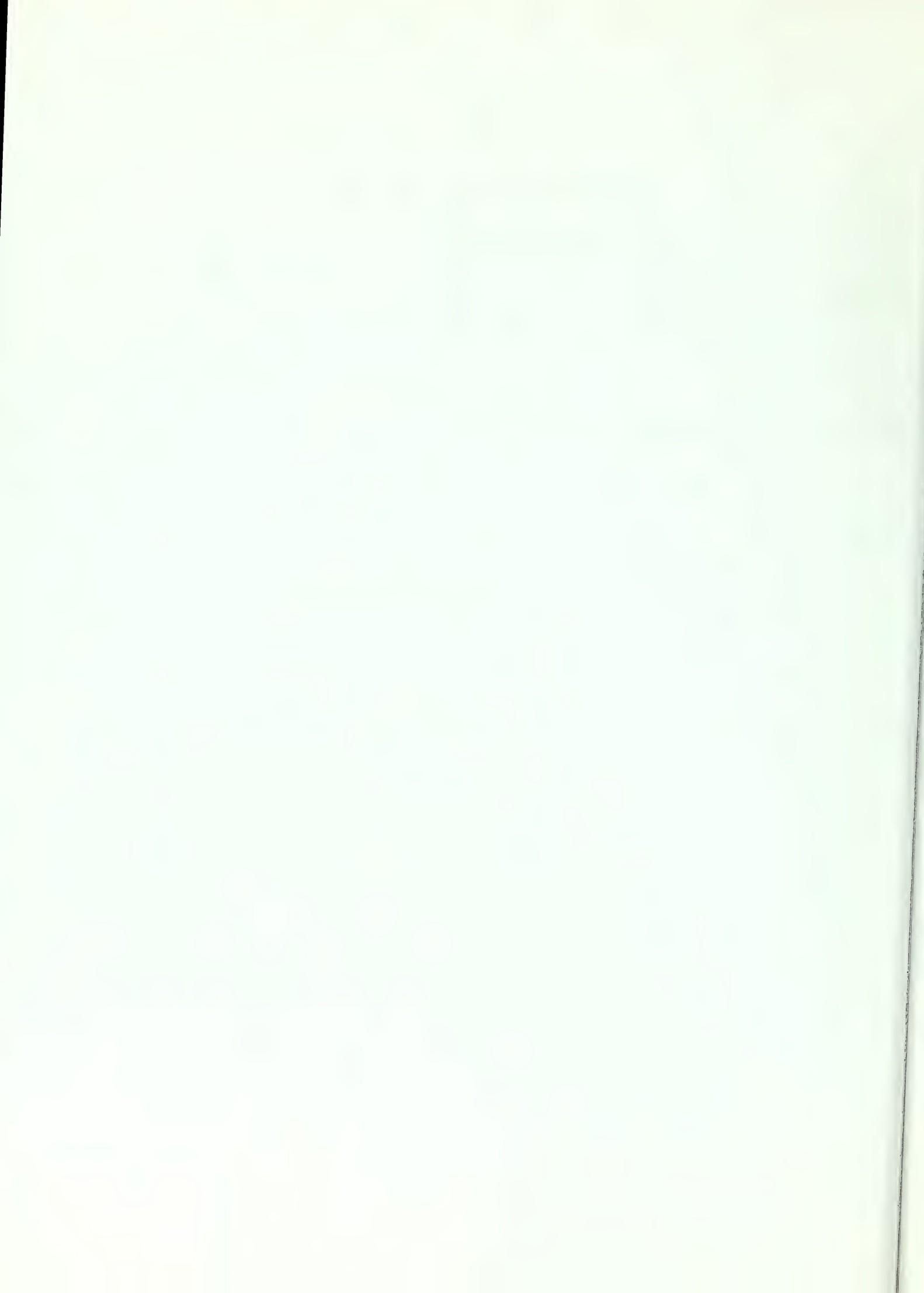
APPELLANT'S OPENING BRIEF

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
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INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I STATEMENT OF JURISDICTION	1
II STATEMENT OF CASE	3
III SPECIFICATION OF ERRORS	3
IV STATEMENT OF THE FACTS	4
V ARGUMENT	6
A. INSUFFICIENT EVIDENCE FOR CONVICTION	6
B. THERE WAS ENTRAPMENT AS A MATTER OF FACT	8b
VI CONCLUSION	12
CERTIFICATE	13



## TABLE OF CONTENTS

	<u>CASES</u>	<u>Pages</u>
Arellanes v. United States, 302 F2d 606		8
Bass v. United States, 326 F2d 384		7
Evans v. United States, 257 F2d 121		6, 8a
Javier Carbajal-Portillo, Rafael Vega-Picos v. United States, Ninth Circuit Nos. 21855, 21855-A		9
Notaro v. United States, 363 F2d 169, 173		9
People v. Antista, 129 CA2d 47		8a
People v. Bledsoe, 75 CA2d 862		8a
People v. Estrada, 234 CA2d 136		8
People v. Foster, 115 CA2d 866		8
Raley v. Ohio, 360 US 423		9
Rodella v. United States, 286 F2d 306		8
Sherman v. United States, 356 US 382		9
Sorrells v. United States, 287 US 435		8b, 9
United States v. Mills, 293 F2d 609		7
United States v. Sherman, 200 F2d 800		9
<u>STATUTES</u>		
Title 18, United States Code, Section 3231		2
Title 18, United States Code, Section 5010b		2
Title 18, United States Code Annotated, Section 5010e		2
Title 19, United States Code, Section 1459		1
Title 19, United States Code, Section 1461		1



Title 19, United States Code, Section 1484	1
Title 19, United States Code, Section 1485	1
Title 21, United States Code, Section 176a	2, 3
Title 21, United States Code Annotated, Section 176a	10, 11
Title 28, United States Code, Section 1291	2
Title 28, United States Code, Section 1294	2
 <u>RULES</u>	
Federal Rules of Criminal Procedure, Rules 29, 37	2



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD EUGENE QUALIN,

) NO. 1681-Criminal

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANT'S OPENING BRIEF

I

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging Appellant guilty of both counts on a two count indictment. The indictment filed on September 13, 1967 charged the Appellant in count one with knowingly smuggling and clandestinely introducing into the United States from the Republic of Mexico approximately 80 pounds of marihuana contrary to law and in violation of United States Code Title 19, Sections 1459, 1461, 1484 and 1485; and, in count two with knowingly concealing and facilitating the transportation and concealment of said marihuana that the Appellant then and there well knew had been imported and brought into the United States



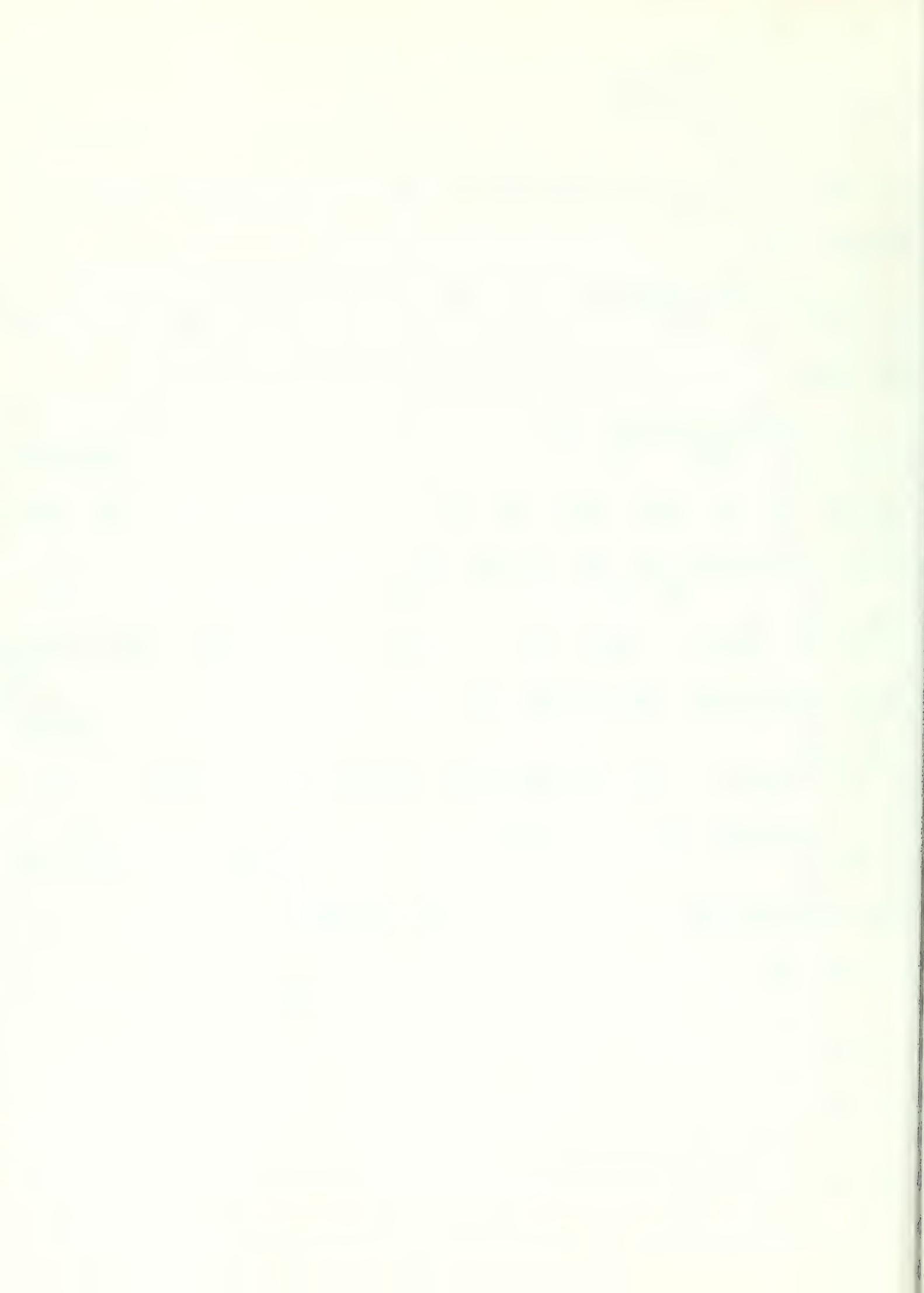
contrary to law and in violation of United States Code, Title 21, Section 176a.

Judgment following trial by court found Appellant was guilty as charged in count one and in count two and was entered on October 26, 1967.

Appellant Qualin was sentenced to prison, under Section 5010e of Title 18, United States Code Annotated, for a 60-day observation period. He was found to be suitable for treatment under the Federal Youth Corrections Act (Transcript of record, p. 17) and on January 15, 1968, following the study under Title 18, United States Code Annotated, Section 5010e, he was returned to the court, and, therefore committed to the custody of the Attorney General for treatment and supervision under Title 18, United States Code, Section 5010b, on both counts to run concurrently. (Transcript of record, p. 18)

A timely Notice of Appeal was filed on behalf of Appellant on January 22, 1968, and on the same date, an order was filed permitting Appellant to proceed in forma pauperis. (Transcript of record, pp. 20, 21)

The District Court has jurisdiction pursuant to the provisions of Title 18, United States Code, Section 3231. This court has jurisdiction to entertain the instant appeal from a judgment under Title 28, United States Code, Sections 1291, 1294 and Rules 37 and 29 of the Federal Rules of Criminal Procedure. (Title 18, United States Code)



II

STATEMENT OF CASE

Appellant Qualin was indicted on September 13, 1967 on two counts under Title 21, United States Code, Section 176a (smuggling and concealing marihuana). Count one charged Appellant with knowingly importing marihuana into the United States from the Republic of Mexico contrary to law. Count two charged Appellant Qualin with knowingly concealing and facilitating the transportation of marihuana contrary to United States law. Appellant entered a plea of not guilty as to both counts.

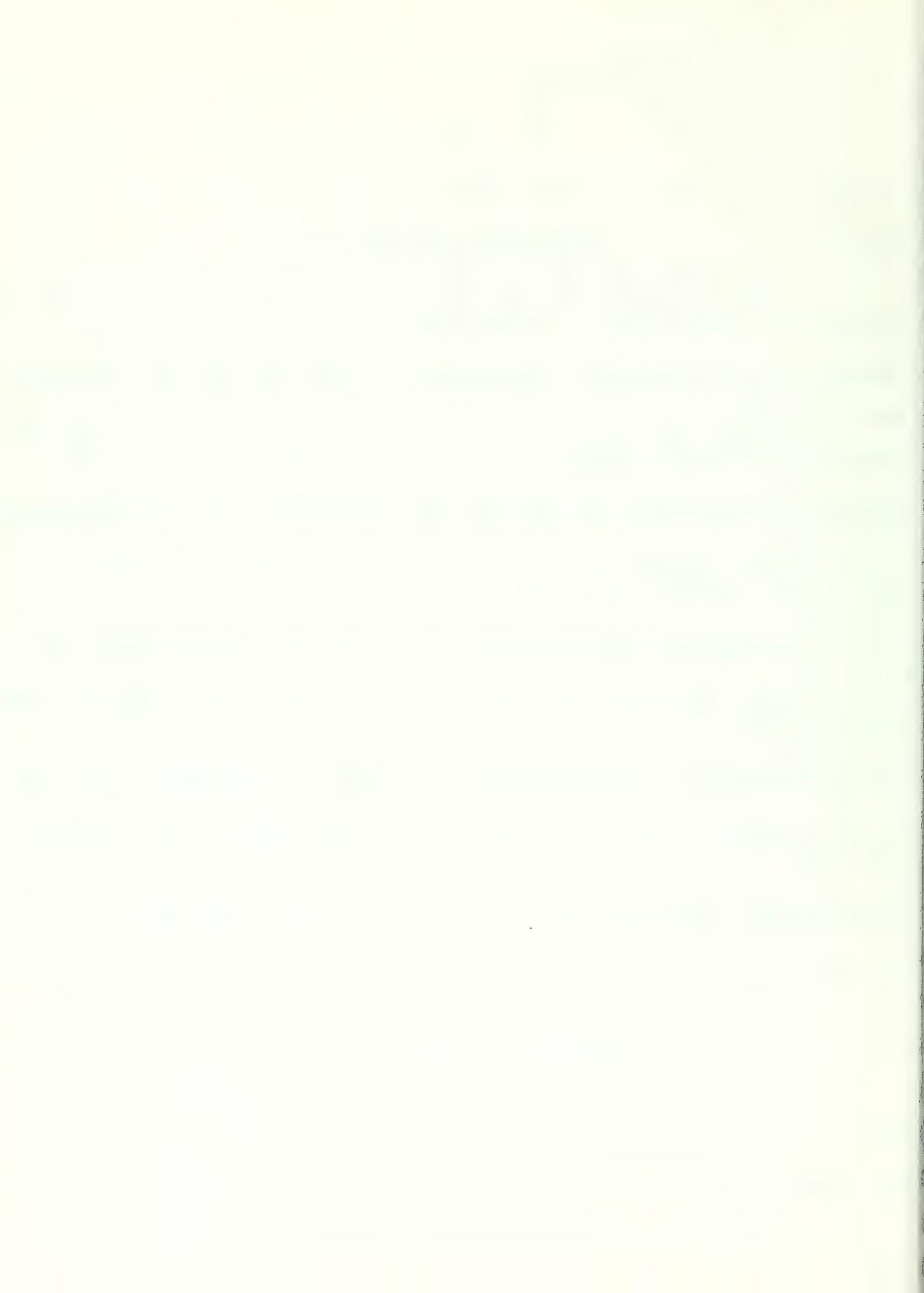
Following trial by court Appellant was found guilty on both counts. Appellant did not move for a new trial, however, since trial was by court and not by jury, counsel for Appellant argued the insufficiency of the evidence to sustain a verdict of guilt as to both counts. (Rptr. tr. pp. 67-68) Therefore, it is submitted that there was no error by failure to move for a new trial. Appellant was sentenced and committed to Lompoc, California.

Appellant appeals.

III

SPECIFICATION OF ERRORS

1. The court erred in finding the Appellant guilty of both counts because there was insufficient evidence to show that Appellant had knowledge of the contents of the automobile.
2. There was entrapment as a matter of fact.



IV

STATEMENT OF THE FACTS

Approximately two days prior to August 9, 1967, Appellant Qualin was approached by Jackie Ray Bailes and asked if he would like to make \$100.00, to which Appellant answered "yes." (Rptr. tr. p. 51, lines 19-21) Appellant did not ask how he was to make \$100.00 nor was he offered any statements to the effect of how he was to earn the said \$100.00. (Rptr. tr. p. 52, lines 7-14) Jackie Ray Bailes accompanied by Appellant, went to Freddie's Bar in Tijuana, Mexico. (Rptr. tr. p. 52, line 17). Jackie Bailes testified that he did not know Appellant well, but had known him for approximately one month. (Rptr. tr. p. 53, lines 1-2) Jackie Ray Bailes then sent Appellant down in the bar and went and contacted a "Mr. Harris." (Rptr. tr. p. 53, lines 7-8) Jackie Bailes did not introduce Mr. Harris to Mr. Qualin, nor in any way have any conversations with either of them. (Rptr. tr. p. 53, lines 7-15) Bailes talked to Harris, pointed out Appellant to Harris and then left the bar. (Rptr. tr. p. 53, lines 18-19). Bailes never told Appellant what type of business Harris was in. (Rptr. tr. p. 55, lines 24-25; p. 56, lines 1-7) Jackie Ray Bailes was an undisclosed informant and he transferred the information concerning Harris' 1967 El Camino Chevrolet pickup to Clarence A. Spohr of the United States Customs Service on August 7, 1967.

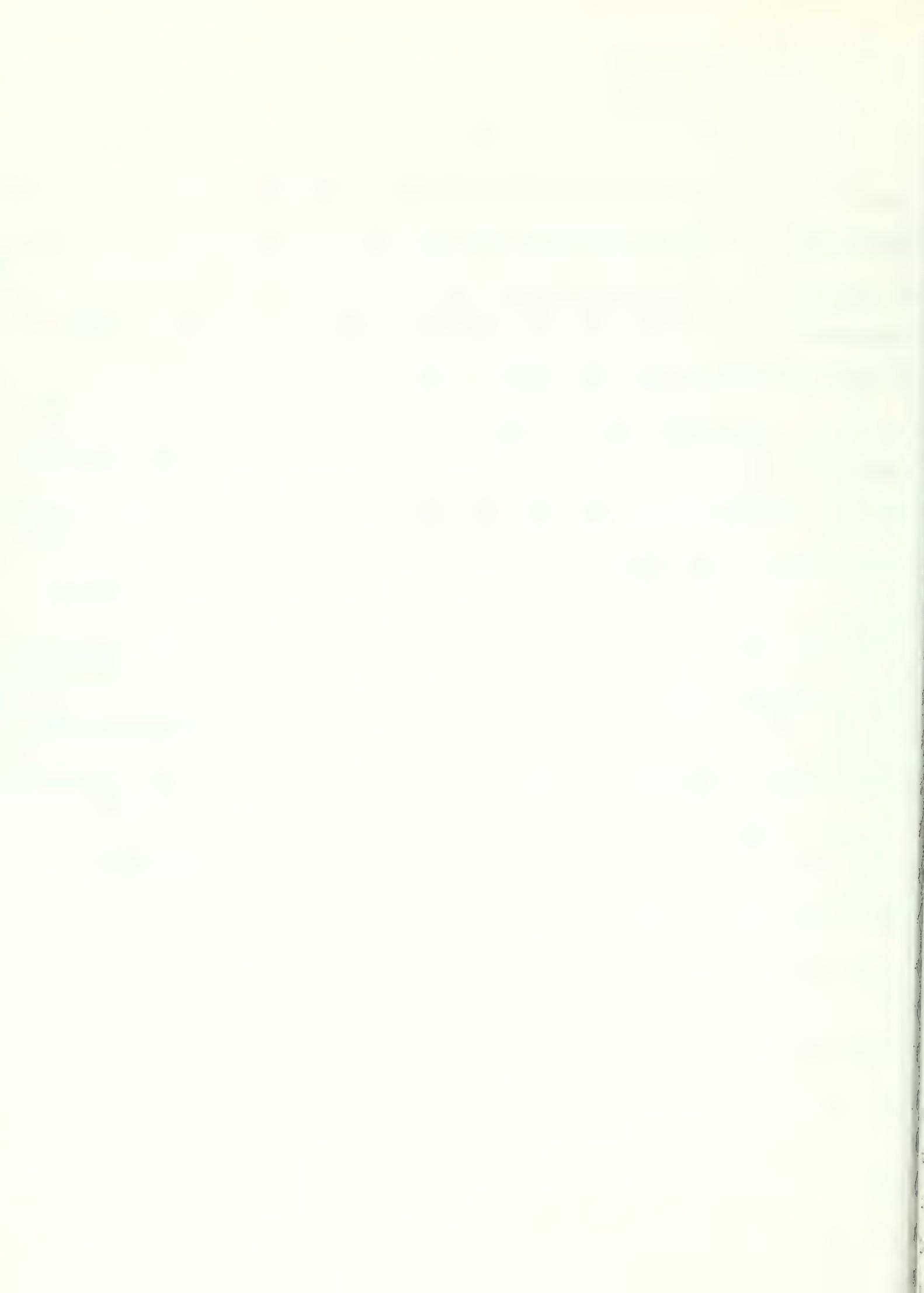
On August 9, 1967, Harris' 1967 El Camino Chevrolet truck was stopped at the San Ysidro border crossing at approximately



7:00 o'clock a.m. by Inspector Raymond A. Larson. (Rptr. tr. p. 23, lines 2-9). Inspector Larson had the license number and description of the 1967 El Camino Chevrolet pickup truck on his "hot sheet", and therefore, referred it to the secondary inspection area. (Rptr. tr. p. 34, lines 9-25; p. 35, lines 1-12)

Appellant driver appeared to have been drinking or under the influence of some sort of sedative. (Rptr. tr. p. 23, lines 20-25) An inspection of the vehicle showed newly spotted nuts and bolt in the bed of the truck. (Rptr. tr. p. 24, lines 3-7) Appellant Qualin was removed from the vehicle and taken inside the Customs building while the truck was searched. (Rptr. tr. p. 25, lines 2-5) Thirty-eight kilograms of marihuana was discovered in the bed of the truck. (Rptr. tr. p. 25, lines 16-17) A personal search of Appellant revealed no contraband on or about him. (Rptr. tr. p. 25, lines 2-5)

Agent Spohr interrogated Appellant and when asked if he could account for the large amount of marihuana in the truck, Appellant stated "no" that he "borrowed that car from a man by the name of Don and . . . was going to San Diego and leave the car at Fifth and G." (Rptr. tr. p. 61, lines 9-12) Appellant further explained that on the 8th he was in Tijuana and had gone to the Blue Note where he had met a girl whose name he did not recall, but that she lived in Pacific Beach (a suburb of San Diego) somewhere. They were together most of the evening, but she didn't have a place to stay. He met Don, the person he had known for two days, at which time Don had loaned him some money for a motel. That they had



gone to the motel and after getting the girl situated in the motel he left, went on back downtown (Tijuana) and decided to go to San Diego. He met Don and asked if he could borrow his car, to which Don had replied "yes", that it was parked across the street from the Chicago Club in Tijuana. He stated that Don had told him to leave the car in San Diego, that he was going up with someone else. (Rptr. tr. p. 61, lines 9-25; p. 62, lines 1-4.

V

ARGUMENT

A

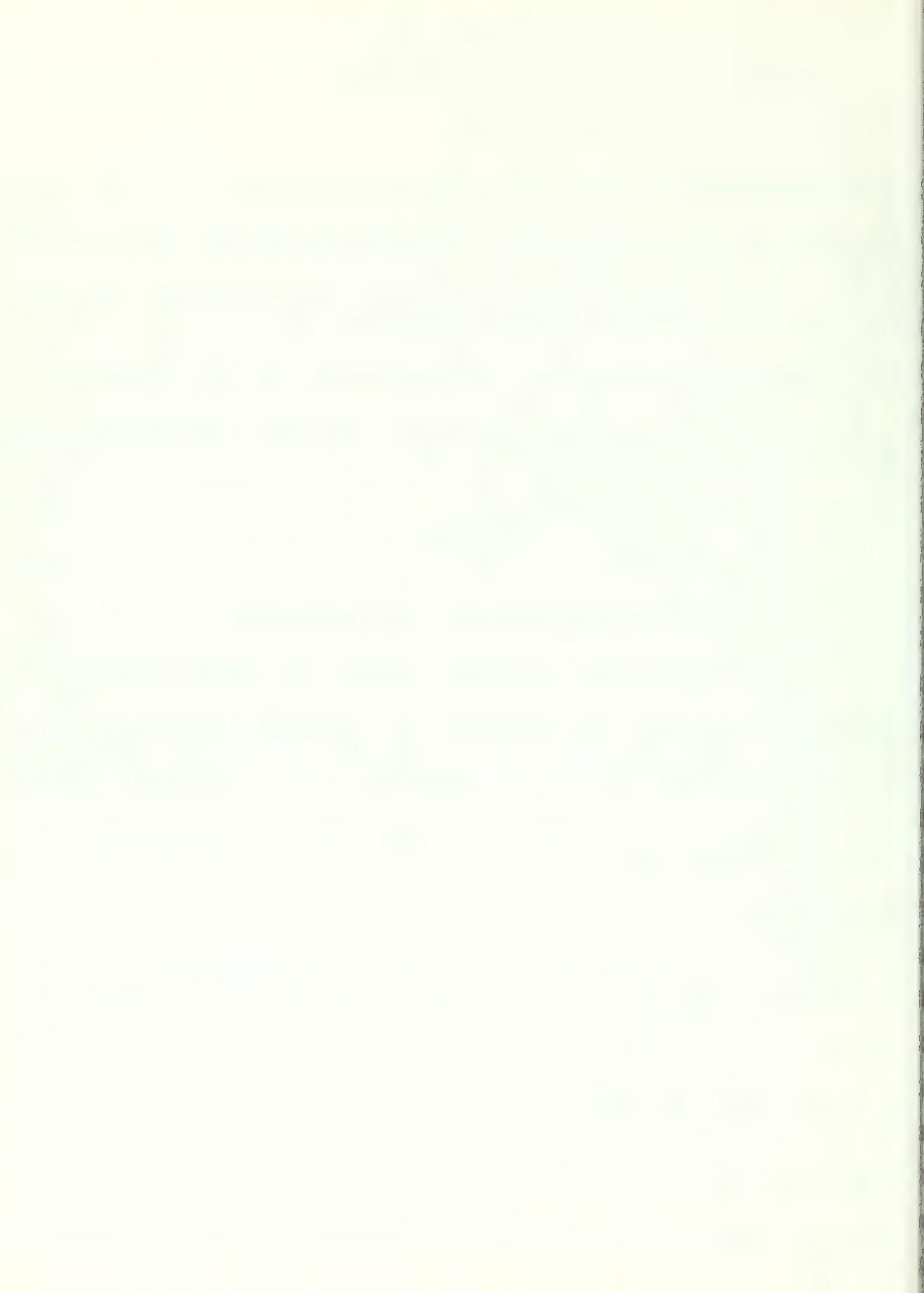
INSUFFICIENT EVIDENCE FOR CONVICTION

The government failed to sustain its burden of proof sufficient to convict the Appellant of counts one and two of the indictment. The government did not present sufficient evidence to show that Appellant Qualin had knowledge of the contraband within Harris' automobile as required in "possession" of narcotics.

In the case of Evans v. United States, 257 F2d 121, it states:

"A person has a narcotic in his possession if he knows of its presence and has control of it, and knowledge and control may be proved circumstantially."

On both direct and cross-examination the record is void of any showing that Appellant had knowledge, dominion or control of the narcotics contained within the paneling of the truck registered in the name of Don Harris. There were no statements or debris on Defendant which could connect or link him to the possession of said narcotics.



In Bass v. United States, 326 F2d 884, it states:

"Both control and knowledge are necessary for the crime of unlawful possession of a narcotic. Knowledge of presence plus control over marihuana amounts to possession sufficient to raise a presumption of guilt. 26 USCA 4741, sub. a2, 4744 sub.a."

In United States v. Mills, 293 F2d 609, it states:

"Offense of knowingly facilitating sale of heroin imported contrary to law was not established, where government failed to show that defendant, who was never shown to have had possession or control of heroin, knew that heroin sold had been unlawfully imported into the United States."

In the case at bar, the testimony of the undisclosed informant, Jackie Ray Bailes, indicates that Appellant Qualin was never appraised of the contents of the truck by Bailes himself; that all he was appraised of was that he could "earn \$100.00."

It is further submitted, that Bailes' testimony, as a government witness, indicates that Qualin had never met Harris before and that Bailes pointed Qualin out to Harris and sent Harris over to him while in a bar in Tijuana. Further testimony indicates that Bailes then left and had no knowledge of what transpired between Harris and Appellant.

Appellant further contends that since none of the conversations between Appellant and Harris was submitted to the Court, that there is no knowledge that the man known as Harris informed Appellant of the contents of the truck and that it cannot be



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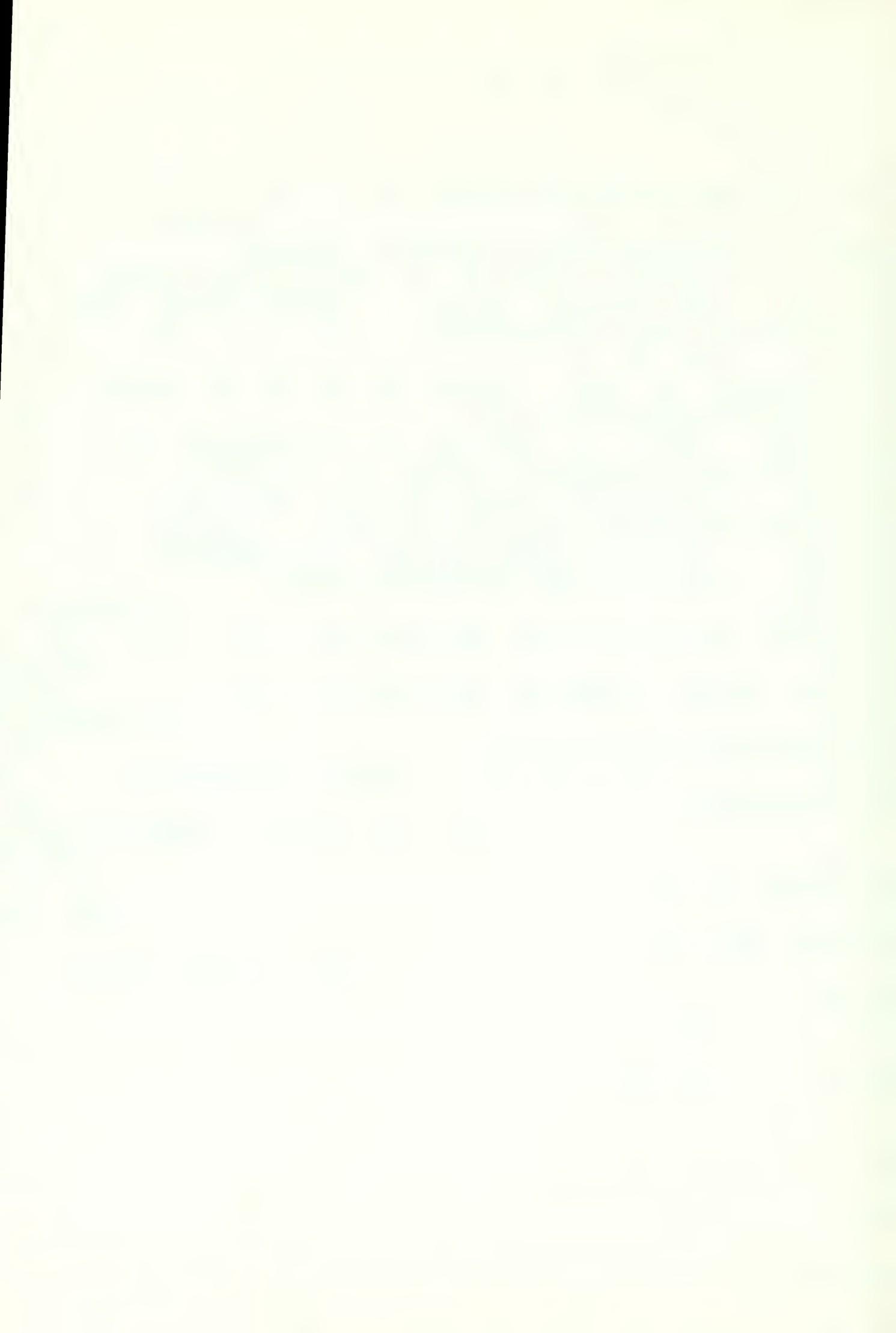
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Appellant further contends that since none of the conversations between Appellant and Harris was submitted to the Court, that there is no knowledge that the man known as Harris informed Appellant of the contents of the truck and that it cannot be



1 presumed that Mr. Harris informed Appellant that the truck, in fact  
2 contained contraband contrary to the Laws of the United States. At  
3 most, the Government was able to prove that Appellant was interested  
4 in earning \$100.00; however, this in itself, is merely a suspicious  
5 circumstance and not sufficient to show the knowledge required at  
6 law before possession of a narcotic may be established, and that  
7 the testimony of the Government's witness, Spohr, indicates that  
8 in interrogation Appellant denied any knowledge of the marihuana in  
9 the car.

0 In the case of People v. Foster, 115 CA2d 866, it states:

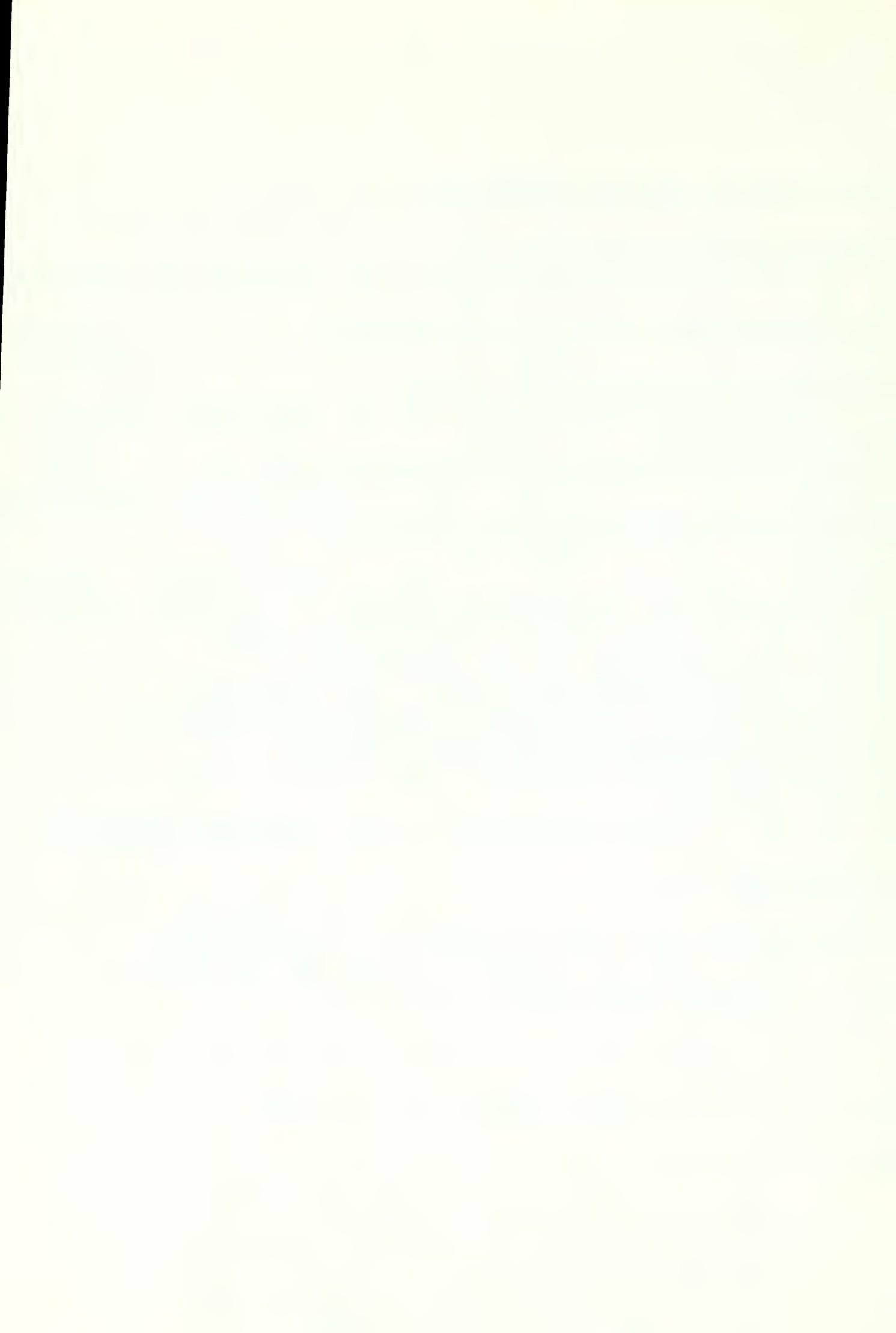
1 "Mere presence at the scene of the crime,  
2 standing alone, is not sufficient to  
3 justify a finding of guilt. The crime of  
4 possession of narcotics requires a physical  
5 or constructive possession of actual know-  
6 ledge of the presence of the narcotic  
7 substance."

5 It is further stated in the case of People v. Estrada,  
6 234, CA2d 136:

7 "Proof of defendant's opportunity of access  
8 to a place where narcotics are found, without  
9 more, will not support a finding the defendant's  
unlawful possession of narcotics."

0 In federal law, the definition of possession was set  
1 forth in the case of Arellanes v. United States, 302 F2d 606, in  
2 which it is stated:

3 "This court has on many occasions passed upon  
4 the meaning of the word possession as used in  
5 21 USC annotated, 174 and 176a. The meaning as  
6 defined in the cases is a "dominion and control  
7 . . . so as to give power of disposal of the  
8 drug." (Rodella v. United States, 286 F2d 306)



Proof of exclusive control of dominion over property on which contraband or narcotics are found is a strong circumstance tending to prove knowledge of the presence of such narcotics and control thereof. (Evans v. United States, 257 F2d 121, Ninth Circuit

"On the other hand, near proximity to the drug, mere presence on the property where it is located or mere association without more, with a person who does control the drug or the property on which it is found is insufficient to support a finding of possession." (People v. Antista, 129 CA2d 47)

In the California case of People v. Bledsoe, 75 CA2d 362, possession as used in criminal law was defined as follows:

"In a prosecution for possession of marihuana in violation of Health & Safety Code Section 11160 the evidence failed to show defendant's knowledge of the presence of the drug to justify a finding of 'knowledge' to satisfy the terms of the statute, where it appeared that the automobile in which the drug was found had been used by another in perpetration of a robbery in another city, that defendant had not used the car since it had been returned, and that others beside him had occupied the car at the time of and immediately following the arrest.

"The appellant grounds his appeal on the failure of the state to prove knowledge and possession. The respondent rests the case upon the failure of the appellant to call other witnesses to substantiate his testimony, and upon the inference, which in this case is a mere suspicion, that, because the appellant had in his possession the key to the car, he must have had possession of the narcotic. (Emphasis added.)

"The distinction which must be drawn from a reading of the foregoing authorities is the distinction between (1) knowledge of the character of the object and the unlawfulness of possession thereof as embraced within the concept of a specific



intent to violate the law and (2) knowledge of the presence of the object as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the possession denounced by the statute. It is knowledge in the first sense which is mentioned in the authorities as being immaterial but knowledge in the second sense is the essence of the offense."

B.I

THERE WAS ENTRAPMENT AS A MATTER OF FACT

In Sorrells v. United States, 287 US 435 (1932), the Court gave its first recognition to the defense of entrapment; but the injustices reaching this result did so by two different routes. Mr. Chief Justice Hughes, speaking for the majority, thought that the defendant was not guilty of violating the statutes in question since "its application in (these. . . circumstances. . . is foreign to its purpose) and/. . . shocking to the sense of justice." (Id. at 446) Mr. Justice Roberts, with whom Justice Brandeis and Justice Stone concurred, found an affirmative defense which "attributes no merit to a guilty defendant," but is based on the court's power to preserve "the purity of its own temple" by preventing the uses of its process to consummate a wrong. (Id at 455, 457) (Concurring opinion)

The criterion of entrapment, which is one general acceptance, is the "origin of intent," which allows the defense if the criminal act was "the product of the creative activity" of law enforcement officials. (Sorrells v. United States, 287 US 435, 451 (1932)) Courts applying this test make two inquiries: whether there was inducement on the part of the government official, and if



so, whether the defendant showed any predisposition to commit the offense. (United States v. Sherman, 200 F2d 800, 882 (2nd Cir. 1952))

The second majority view, which is exemplified by the concurring opinions in Sorrells and Sherman adopt an objective test, whereby the Court considers only the nature of the policy activity involved, without reference to the predisposition of the particular defendant. Thus, police conduct which "falls below standards to which common feelings respond for the proper use of government power." (Sherman v. United States, 356 US 369, 382 (1958)) would bar a conviction.

Applying any one of the above tests to our present case would seem to entitle Appellant Qualin to the defense of entrapment as a matter of fact, because the testimony at trial did not indicate that Appellant Qualin had any predisposition to commit a crime until he was approached by the undisclosed informant Bailes. In Raley v. Ohio, 360 US 423, it states:

"When society, through its law enforcement officials has been the cause of an individuals action, it seems unjust for society to punish him."

In the recent case of Javier Carbajal-Portillo, Rafael Vega-Picos v. United States, Ninth Circuit No. 21855 and 21855-A, quoting Notaro v. United States, 363 F2d 169, 173 (Ninth Circuit 1966), Judge Elly noted that in Sorrells, supra, "it was not thought to be right and just that a government should instigate and successfully pursue prosecution for the commission of an act which the



prosecuted would not likely have committed, but for the importunity of an agent of the government itself." (Emphasis added)

Appellant Qualin respectfully submits that if Mr. Harris to had talked/Appellant, who had no predisposition to commit a crime in violation of 21 United States Code Annotated, 176a, that there was entrapment in fact under the theory of agency because Bailes, the undisclosed informant, was an agent of the government and acting as an agent of Mr. Harris as well, and that in his capacity as an agent for the government, Mr. Bailes was to inform the United States Customs of the importation of marihuana into the United States contrary to United States Law, and that the evidence shows that the informant, Bailes, had knowledge that Harris was engaged in said illicit traffic. However, Harris could not import the marihuana into the United States without a driver for his truck. As Harris' agent Bailes was required to find a prospective driver. The testimony indicates, in fact, that Bailes did find Appellant Qualin, asked him if he was interested in making a \$100.00, set him down in a bar in Tijuana, Baja California, and then procurred Harris, and sent Harris over to Appellant Qualin. There was no testimony by Mr. Bailes to indicate how many different men he had introduced to Mr. Harris and there is no testimony as to how many men did, in fact, drive a truck for Mr. Harris, nor is there testimony to indicate if any men refused to drive a truck for Mr. Harris.

Appellant further respectfully submits that an agent is bound by the acts of his principal as equally as the principal is



bound by the acts of the agent.

It is further respectfully submitted that if Bailes had been the one to talk to Appellant Qualin, offered him the money, indicated that it could be earned by driving a car containing contraband into the United States and then, in turn, had informed the government as its agent of this action that an entrapment in fact and at law would have occurred.

It is respectfully submitted that an entrapment in fact occurred because even though Mr. Harris was the one who employed Mr. Qualin to drive the truck across the border it was the government's agent who placed Appellant into contact with Mr. Harris with the knowledge that Mr. Harris was involved in an illegal enterprise with the hopes that Mr. Harris could employ Appellant to transfer the contraband from Mexico into the United States of America.

The evidence at trial is devoid of any further conversations between Mr. Harris and informant Bailes, but it seems logical to infer that the information reached Mr. Bailes, that the truck would in fact, enter the United States at a particular time and this information then was passed to the United States Customs officials and the subsequent arrest of Appellant Qualin was made.

Appellant respectfully submits that the crime in violation of 21 United States Code Annotated, 176a was created by the informant, Mr. Bailes, in that there is no evidence to show that Mr. Harris was willing to transport the narcotic himself and that the evidence



logically infers that this knowledge was possessed by Mr. Bailes and in order to work in his capacity as an undisclosed informant and agent for the United States Government it was incumbent upon him to search for and procur an individual whom he felt might likely become an employee of Mr. Harris. The facts further indicate that during the conversations between Mr. Harris and Appellant, Mr. Harris in some way did, in fact, induce him to drive the truck into the United States from Mexico.

Appellant respectfully submits that under the doctrine of entrapment that this is the very type of crime which comes within the umbrella of protection because, in essence, the crime was created and executed by the very same government which prosecuted the crime.

VI

CONCLUSION

Because of the foregoing argument, the oral and documentary evidence received at trial, and the obvious instigation of a crime by an agent of the government, it is respectfully submitted that the judgment as to Qualin be reversed.

Respectfully submitted,

HECSH, HEGNER & PHILBIN

*Michael S. Hegner*

MICHAEL S. HEGNER

Attorneys for Appellant



CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.

*Michael S. Hegner*  
MICHAEL S. HEGNER



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WALTER E. MAXTED, )  
Appellant, )  
vs. )  
UNITED STATES OF AMERICA, )  
Appellee. )

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NO. 22773 ✓

FILED

APPELLEE'S BRIEF

JUL 29 1968

WM. B. LUCK, CLERK

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WALTER E. MAXTED, )  
                        )  
                        Appellant, )  
                        )  
vs.                    )                                 NO. 22773  
                        )  
UNITED STATES OF AMERICA, )  
                        )  
                        Appellee. )  
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APPELLEE'S BRIEF

APPEAL FROM  
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## TOPICAL INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I STATEMENTS OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION	1
II STATUTES INVOLVED	2
III STATEMENT OF THE CASE	3
IV ARGUMENT	10
A. THE LOWER COURT DID NOT ERR IN ALLOWING THE GOVERNMENT ON CROSS-EXAMINATION TO ASK THE APPELLANT "WHY WERE YOU ACTING AS INFORMANT FOR THE FEDERAL BUREAU OF NARCOTICS?" WHEN APPELLANT TESTIFIED ON DIRECT THAT HE HAD WORKED AS AN INFORMANT WITH THAT AGENCY.	10
1. Standing	10
2. Admission of Appellant's Statements Explaining Direct Testimony Not Unduly Prejudicial	11
3. Answer to Appellee's Question Not Hearsay	16
V CONCLUSION	18
CERTIFICATE	19



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Alford v. United States 282 U.S. 687 (1931)	13
Banning v. United States 130 F.2d 330, 338 (6th Cir. 1942)	11, 12, 14
Branch v. United States 171 F.2d 337, 338 n. 3 (D.C. Cir. 1948)	13
DeVore v. United States 368 F.2d 396 (9th Cir. 1966)	15
Dolan v. United States 218 F.2d 454, 460 (8th Cir. 1955)	14
Enriquez v. United States 314 F. 2d 703 (9th Cir. 1963)	15
Fairmount Glass Works v. Cub Fork Coal 287 U.S. 474, 485 (1933)	14
Mannix v. United States 140 F.2d 250, 252 (4th Cir. 1944)	17
Mora v. United States 190 F.2d 749 (5th Cir. 1951)	14
Norwood v. Great American Indemnity 146 F.2d 797, 800 (3d Cir. 1944)	11
United States v. D'Antonio 362 F.2d 151, 154 (7th Cir. 1966)	12
United States v. Pennix 313 F.2d 524 (4th Cir. 1963)	16



	<u>Page</u>
United States v. Rayborn 310 F.2d 339, 340 (6th Cir. 1962)	12
United States v. Sing Kee 250 F.2d 236, 241 (2d Cir. 1957)	11

Statutes

California Evidence Code, Section 1200	17
Title 18, United States Code, Section 3231	2
Title 21, United States Code, Section 176(a)	1, 2
Title 28, United States Code, Section 1291	2
Title 28, United States Code, Section 1294	2



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

WALTER E. MAXTED, )  
vs. )  
UNITED STATES OF AMERICA, )  
Appellant, )  
vs. )  
Appellee. )  
NO. 22773

**APPELLEE'S BRIEF**

I

## STATEMENTS OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION

On July 20, 1966, the Federal Grand Jury for the then Southern Division of the Southern District of California returned a seven-count indictment, Criminal Case No. 37002-SD, charging appellant in Counts One through Count Seven with violations of Title 21, United States Code, Section 176(a), knowingly selling and facilitating the transportation of illegally imported marijuana.

Clerk's Transcript, pp. 2-8 (hereinafter referred to as C. T.)



On January 16, 1968, a trial by jury commenced in this matter on Counts One through Six. Id. at 52. On January 18, 1968, appellant was found guilty of Counts One, Two, Five, and Six, id. at 54, with Counts Three, Four and Seven dismissed on motion by appellee. Id. at 52.

On February 16, 1968, appellant was committed by the Honorable Fred Kunzel to the custody of the Attorney General for a period of seven (7) years concurrently on each count. Id. at 57. A timely Notice of Appeal was filed. Id. at 58.

The offenses occurred in the then Southern Division of the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 176(a), and Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTES INVOLVED

Title 21, United States Code, Section 176(a), provides inter alia:

"[W]hoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or



clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000."

### III

#### STATEMENT OF THE CASE

##### A. Questions Presented

1. Did the lower Court err in allowing appellee on cross-examination to ask the appellant "Why were you acting as informant for the Federal Bureau of Narcotics?" when the appellant testified on direct that he had worked as an informant with that agency?

##### B. Statement of the Facts

On June 17, 1966, Larry Katz, an agent of the Federal Bureau of Narcotics, working in an undercover capacity, saw



appellant deliver the kilo of marijuana which Katz had ordered and purchased through co-defendant Warren Lee Wilson.

Reporter's Transcript, pp. 14, 17 (hereinafter referred to as R. T.).

On July 11, 1966, Katz again ordered some marijuana from Wilson. As previously done, appellant delivered the marijuana. In addition to Katz, this delivery was also witnessed by Federal Bureau of Narcotics Agent Joe Baca, who had followed appellant to the drop area. Id. at 108-10. Appellee called Katz and Baca to testify to all the occurrences that took place. Nowhere, however, in appellee's case in chief against appellant, did appellee elicit any information about appellant's being an informer, or attempt to find out why the appellant had known Baca previously, or if Baca knew him to be working as an informer in order to "work off his beef." Id. at 12-152.

The testimony that appellant specifies as error does not begin to unfold until appellee's cross-examination of appellant's first witness, Chris Saiz, a Federal law enforcement agent. In order to place appellee's cross-examination in its proper perspective, it is first necessary to set forth the pertinent facts brought out on direct testimony by the appellant's questioning.



The following facts were elicited from Saiz on direct:

"Q: Now, Mr. Saiz, do you know my client,  
Mr. Walter Maxted?

A: Yes, sir, I do.

Q: Approximately how long have you known  
him?

A: Approximately two and a half years.

Q: Now, did he at any time work with you  
as an informant helping you determine  
who the people were who were trafficking  
in narcotics? [Emphasis added.]

A: Yes, he did.

Q: Did he work with you extensively? By  
that, a number of times? [Emphasis  
added.]

A: Yes, he did work a number of times.

Q: Will you describe for us, please, whether  
he was what one would call an active  
cooperative worker? [Emphasis added.]

A: He--he introduced me to a marijuana  
trafficker in the Los Angeles area; he  
introduced me to him, and I subsequently



made marijuana purchases from this individual.

Q: Were you working in an undercover capacity yourself?

A: Yes, I was.

Q: Did you have occasion to give Mr. Maxted orders for him to carry out in regard to this work he was doing for you?

A: Yes, I did.

Q: Did he cooperate in following those orders?  
[Emphasis added.]

A: Yes, he done [sic] as he was instructed.

Q: Had you had occasion to contact him here in the San Diego area?

A: No, sir, I don't recall that I ever met Mr. Maxted in the San Diego area."

Id. at 153-54.

On cross-examination, appellee asked Saiz, "And do you know why it was he was working for the F.B.I.?" This question was objected to by appellant as being hearsay, irrelevant and immaterial. Id. at 155. The objection was sustained as calling for "hearsay" statement on the part of this witness. Id. at 162.



When the appellant took the witness stand, his direct testimony, pertinent to his specified error, is as follows:

Q: Mr. Maxted, referring back to 1966,  
did you during that year up to June the  
17th work as an informant with the  
Federal Bureau of Narcotics?

A: Yes, I did.

Q: Did you have any occasion to work with  
those people located in the San Diego  
office?

A: I did.

Q: What were the names of the agent or agents  
that you worked with?

A: Agents Ray Cantu and Agents Joe Baca."  
Id. at 192-93.

On cross-examination, appellee asked the following questions and received the following answers from the appellant:

Q: Mr. Maxted, you worked as an informant  
for the Federal Bureau of Narcotics. Is  
that correct?

A: Yes.

Q: In Los Angeles?

A: Yes.



Q: What time did your employment terminate?

Your services for the Federal Bureau of  
Narcotics?

A: At the time of arrest of an individual in the  
Los Angeles vicinity when the agent that  
testified earlier this morning one Chris Saiz  
life was threatened and mine.

Q: Well, when was that, Mr. Maxted?

A: It was in about March.

Q: Of what year?

A: 1966.

Q: You didn't do anything in the Federal  
Bureau of Narcotics after that, did you?

A: No.

Q: Now, you weren't actually employed by  
the Federal Bureau of Narcotics, were you?

A: No.

Q: You were acting as an informer?

A: Yes.

Q: Why were you acting as informant for the  
Federal Brueau of Narcotics?

• • • • •



Mr. Milchen:

Q: You were arrested for possession of marijuana by the state authorities. Is that correct?

A: That is correct."

Id. at 218-19.

. . . . .

IV

ARGUMENT

A. THE LOWER COURT DID NOT ERR IN ALLOWING THE GOVERNMENT ON CROSS-EXAMINATION TO ASK THE APPELLANT "WHY WERE YOU ACTING AS INFORMANT FOR THE FEDERAL BUREAU OF NARCOTICS?" WHEN APPELLANT TESTIFIED ON DIRECT THAT HE HAD WORKED AS AN INFORMANT WITH THAT AGENCY.

---

1. Standing

The record shows that it was a "hearsay" objection that was sustained on the question asked of Saiz concerning the reason appellant worked as an informant. Id. at 220. The question asked appellant that elicited the evidence which appellant assigns error was objected to without sufficient specificity. Appellant



objected by stating ". . . then the same objection applies here that applies to Mr. Saiz and I so object." Id. The objection that was ultimately applied to Mr. Saiz was a "hearsay" objection. Id. The only grounds that one can assume were stated when appellee asked the question now in issue are a hearsay objection. It is clear that "when the trial judge correctly overrules a specific objection, it cannot be argued on appeal that the evidence . . . was improper for a different reason." United States v. Sing Kee, 250 F.2d 236, 242 (2d Cir. 1957). See also Norwood v. Great American Indemnity, 146 F.2d 797, 800 (3d Cir. 1944). Appellant should not now be allowed to appeal that the evidence was irrelevant and prejudicial when the grounds for such an objection were not stated when the alleged erroneous question was asked.

2. Admission of Appellant's Statements Explaining Direct Testimony Not Unduly Prejudicial

Assuming that appellant may now appeal the trial court's ruling, the evidence elicited by appellee on cross-examination does not fall within the general rule of exclusion, or, in the alternative, does not fall outside an exception to the general rule because its prejudice outweighs its probative value.

Appellee would agree that standing alone evidence of previous wrongful acts is highly prejudicial. However, appellee adopts the position of the court in Banning v. United States,



130 F.2d 330, 338 (6th Cir. 1942), where it found:

"It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination."

In Banning, the defendant on direct examination detailed his past offenses and the times he had been arrested. However, he omitted any statement with reference to his arrest in Iowa. The Government then brought out on cross-examination the fact that he was suspected of bank robbery in Council Bluffs, Iowa, July 2, 1931. Banning was cited for authority on similar issues in United States v. Rayborn, 310 F.2d 339, 340 (6th Cir. 1962) and United States v. D'Antonio, 362 F.2d 151, 154 (7th Cir. 1966).

The facts in Banning are almost identical with the facts now before this Court. The appellant places into evidence that he worked as an informant for the Federal Bureau of Narcotics. Previous to appellant's testimony, he examined, on direct, witness Saiz on exactly this issue. Appellant, in restricting his testimony, gave the jury a distorted picture as to the nature and



extent of his federal duties. The first utility of cross-examination, as envisaged by Wigmore, is the extraction of qualifying circumstances known, but undisclosed, by the witness. Branch v. United States, 171 F.2d 337, 338 n. 3 (D.C. Cir. 1948).

No citation is necessary on the proposition of law that the extent of cross-examination lies in the sound discretion of the trial judge. In absence of abuse, the exercise of that discretion is not reviewable. In this case there was no abuse of discretion. Appellant testified to the fact that he worked as an informant for the federal agency in charge of investigating narcotics. The trial judge was within his discretion in allowing appellee to inquire as to appellant's motive or reasons for such activity. The sole purpose of this question was to place the appellant in his proper setting. Alford v. United States, 282 U.S. 687 (1931).

Any prejudice that may have attached to appellant because of the appellee's cross-examination cannot be declared reversible error. Evidence of appellant's prior arrest, even if prejudicial, must be viewed as harmless error since (1) the questioning by appellee was in the context of cross-examination of material testified to by appellant on direct, (2) the trial judge gave cautionary instructions to the jury requesting them to disregard the reason given by appellant for his employment in the Federal Bureau of Narcotics, R. T. p. 258, and (3) appellee could have



introduced evidence of the prior possession of marijuana in its case-in-chief as a prior similar act showing intent and knowledge.

Appellee's argument as to the first point has been previously made with respect to the Banning discussion.

Second, the general rule is that where evidence is erroneously admitted, the subsequent striking of it from the case, accompanied by a clear and positive instruction to the jury to disregard the evidence, cures the error. A rule which would require a trial court to declare a mistrial and to discharge a jury whenever the court discovered that evidence had been improperly and mistakenly admitted would be absurd. Dolan v. United States, 218 F.2d 454, 460 (8th Cir. 1955). As was said by Mr. Justice Brandeis in Fairmount Glass Works v. Cub Fork Coal, 287 U.S. 474, 485 (1933), "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

Appellant cites Mora v. United States, 190 F.2d 749 (5th Cir. 1951), contending that this evidence created such a strong impression upon the jury so as to render ineffective any direction by the trial court to disregard such evidence. Mora involved the confession of a co-defendant implicating the appellant. The court ruled the inadmissible confession made a deep and lasting



impression in the minds of the jurors. This was not the situation in the present case, and therefore, the instruction of the judge cured any error in admitting the statement of the appellant.

Third, any error that might have occurred must be considered harmless since appellee could have shown in its case-in-chief the prior similar act of possession of marijuana by the appellant as probative of proving intent and knowledge in the present case. In Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963), Judge Barnes, in dictum, held that use or possession of marijuana would be admissible to show the specific intent in a subsequent sale of marijuana charge. Id. at 714.

Appellant argues that DeVore v. United States, 368 F.2d 396 (9th Cir. 1966), requires reversal of the present case because the evidence admitted was overly prejudicial. DeVore, however, must be limited to its facts, and thus cannot apply to the case on appeal. In DeVore, plaintiff placed in its case-in-chief an overabundance of evidence concerning collateral wrongful acts (fifteen separate charge slips introduced into evidence, with the witness being asked to orally describe the articles, and then to list them on the easel; also a written list of the articles was introduced as an exhibit and sent to the jury room; in addition, the prosecutor emphasized the incident in his summation, twice itemizing the merchandise, and repeatedly referred



to appellant's involvement in the unauthorized purchases); whereas in the present case appellee merely asked one qualifying question on cross-examination, R. T. pp. 219, 220, of material that was testified to on direct by the appellant, id. at 192-93, and did not, during argument, comment on the evidence received. Id. at 264-74, 295-304.

### 3. Answer to Appellee's Question Not Hearsay

The appellant answered the critical question "Why were you acting as informant for the Federal Bureau of Narcotics?" by stating that he had an arrest pending. Id. at 219-20. Appellant argues that this evidence was inadmissible as hearsay. However, appellant's authority for this proposition, United States v. Pennix, 313 F.2d 524 (4th Cir. 1963) is not in point with respect to the question and answer now before this Court.

Pennix held that a witness may not be asked if he has been accused or arrested for a crime since the question calls for hearsay evidence. Id. at 528. Pennix's holding was with respect to the cross-examination of a witness for the purpose of impeaching his credibility. Therefore, the witness's statements were offered to prove the truth of the matter stated, consequently hearsay.

The present case can be distinguished from Pennix. First, there is no attempt to use a collateral matter to discredit



the witness. The question was relevant to the issue raised by the appellant on direct testimony. Second, the question asked by appellee did not as a matter of necessity call for hearsay testimony. Appellant could have enumerated several reasons for becoming an informer, and appellee would have been bound with his reasons. Third, and most important, the statements were for the purpose of showing the motives of the appellant, and not to prove the truth of the matter stated, i.e., that appellant had as a matter of fact been arrested for possession of marijuana.

Before evidence may be considered hearsay, it must be offered to prove the truth of the matter stated. Cal. Evid. Code Section 1200 (West Supp. 1965). Although there appear to be no cases with facts paralleling the present case, an analogy can be drawn to cross-examination of character witnesses with respect to their testimony concerning defendant's general reputation for truth and veracity. In Mannix v. United States, 140 F.2d 250, 252 (4th Cir. 1944) the court cited 71 A. L. R. 1514 stating:

"The purpose of the cross-examination of the defendant's character witness with reference to particular acts of the defendant is not to establish such acts as facts, or to prove the truth of the rumors or charges inquired about,



but merely to show the circulation of rumors  
of such acts, and to test the credibility of the  
character witness by ascertaining his good  
faith, information and accuracy." [Emphasis  
added.]

On this basis, the evidence elicited from the appellant in the  
present case did not come in as hearsay.

V

CONCLUSION

Appellee respectfully submits that appellant's conviction  
should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.  
United States Attorney

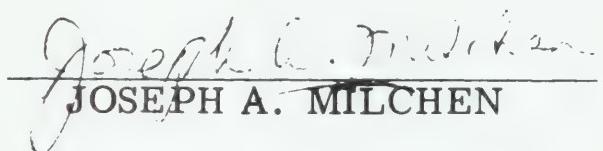
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
\_\_\_\_\_  
JOSEPH A. MILCHEN



NO. 22774

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT EDWARD TOOHEY,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

FILED

JUL 31 1968

WM. B. LUCK

APPELLEE'S BRIEF

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FOR THE CENTRAL DISTRICT OF CALIFORNIA

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## TOPICAL INDEX

	<u>Page</u>
Table of Authorities.	ii
I STATEMENT OF JURISDICTION.	1
II APPLICABLE STATUTES.	2
III QUESTIONS PRESENTED.	3
STATEMENT OF FACTS.	3
ARGUMENT.	9
A. THERE WAS PROBABLE CAUSE FOR THE STOPPING AND EVEN- TUAL ARREST OF TOOHEY.	9
B. THE PROSECUTION WAS ENTITLED TO INTRODUCE THE VEHICLE IDEN- TIFICATION NUMBER INTO EVI- DENCE.	12
C. THE DEFENSE WAS NOT ENTITLED TO THE IDENTITY OF THE IN- FORMER.	13
D. MIRANDA DOES NOT REQUIRE THE SUPPRESSION OF TWO WITNESSES FOUND FROM AN ADDRESS WHICH WAS LAWFULLY OBTAINED BY THE POLICE AND THE F. B. I.	14
E. CONCLUSION.	17



TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Busby v. United States, 296 F. 2d 328 (9th Cir. 1961), cert. denied 369 U.S. 876 (1962)	10
Costello v. United States, 298 F. 2d 99 (9th Cir. 1962), cert. denied 376 U.S. 930	13
Draper v. United States, 358 U.S. 307 (1959)	10
Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966)	11, 16
Johnson v. New Jersey, 384 U.S. 719 (1966)	15
Miranda v. Arizona, 384 U.S. 436	3, 14-16
Nardone v. United States, 308 U.S. 388 (1939)	12, 16
Newcomb v. United States, 327 F. 2d 649 (9th Cir. 1964), cert. denied 377 U.S. 944	13
Powell v. United States, 386 F. 2d 386 (9th Cir. 1967)	14
Preston v. United States, 376 U.S. 364 (1964)	12
Rios v. United States, 364 U.S. 253 (1960)	10
Roviaro v. United States, 353 U.S. 53 (1957)	13
Rugendorf v. United States, 376 U.S. 528 (1964)	13
Terry v. Ohio, 3 Cr. L. 3149, decided June 10, 1968	11
United States v. Bonanno, 180 F. Supp. 71 (S. D. N. Y. 1960)	10, 11



	<u>Page</u>
United States v. Bufalino, 285 F. 2d 408 (2nd Cir. 1960)	10
Wong Sun v. United States, 371 U. S. 471 (1962)	12, 16
<u>Constitution</u>	
United States Constitution	
Fifth Amendment	16
Sixth Amendment	16
<u>Statutes</u>	
Title 18 United States Code	
§2312	1, 2
§2313	1, 2
§3231	2
Title 28 United States Code	
§1291	2
§1294	2



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APPELLEE'S BRIEF

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I

STATEMENT OF JURISDICTION

On November 9, 1966, the appellant was indicted in two counts, by the Federal Grand Jury for the Southern District of California, Central Division, for the interstate transportation of a stolen motor vehicle and its concealment and storing, in violation <sup>1 /</sup> of Title 18, United States Code, Sections 2312 and 2313 [C. T. 12]. Following a court trial before the Honorable John W. Delehant, <sup>2 /</sup> Senior United States District Judge, <sup>2 /</sup> on January 16 and 17, 1967

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1 / C. T. refers to Clerk's Transcript.

2 / Sitting by designation of Earl Warren, Chief Justice, United States Supreme Court.



the defendant was found guilty, and on February 14, 1967, appellant was committed to the custody of the Attorney General for eighteen months on each count, the sentences to begin and run concurrently [C. T. 33].

There was a Notice of Appeal filed on February 15, 1967 [C. T. 34].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2312, 2313 and 3231.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

### APPLICABLE STATUTES

Title 18 United States Code, Section 2312:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5, 000 or imprisoned not more than five years, or both."

Title 18 United States Code, Section 2313:

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than \$5, 000



or imprisoned not more than five years, or both."<sup>1</sup>

### III

#### QUESTIONS PRESENTED

A. Whether there was probable cause for the stopping and subsequent arrest of the defendant.

B. Whether the prosecution was entitled to use and introduce into evidence the vehicle identification number of the automobile in the possession of the defendant at the time of his arrest.

C. Whether the defense was entitled to the identity of the informer for the purpose of questioning probable cause.

D. Whether Miranda v. Arizona shall be applied to exclude witnesses and their testimony found as a result of an address given by a person in custody when the statement was made with adequate constitutional warnings prior to the Miranda decision.

#### STATEMENT OF FACTS

The automobile referred to in the indictment, a 1964 red Thunderbird convertible, vehicle identification number 4Y85Z190110, was stolen from Automobile Sales, Incorporated, 95 Liberty Street, Springfield, Massachusetts [R. T. 220-21].<sup>3 /</sup> The vehicle was

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3 / "R. T." refers to Reporter's Transcript.



stolen between January 20, 1966, and February 11 of the same year [R. T. 220-21].

In the early part of 1966 the defendant was talking to the former husband of Evelyn Schroeter and at that time told her husband that he drove a car from Springfield, Mass., to Los Angeles [R. T. 228]. The vehicle discussed was a Thunderbird [R. T. 229]. The defendant told Mr. Schroeter about changing the license and motor numbers and then driving it across country [R. T. 229]. At that time, Mr. Schroeter told Toohey he was crazy for doing such a thing [R. T. 229].

In January of 1966 the defendant told Daniel T. Hulette that he was going to Springfield [R. T. 259], and then, after January, told Hulette that he had a car for sale [R. T. 256]. At various times Toohey offered the car, a red Thunderbird convertible, to Hulette and also others [R. T. 260, 269, 272].

On January 27, 1966, the defendant, in Panorama City, California, had "a sharp red T-Bird" which was a convertible with a black top and white upholstery [R. T. 282-83].

Inasmuch as the defendant has challenged the legality and propriety of his arrest and subsequent investigation reference is made to that arrest and the events leading up to it.

In the early afternoon of March 30, 1966, Sergeant Francis M. Wheeling, of the Intelligence Division of the Los Angeles Police Department, received word from an informant of his that a 1965 red Thunderbird convertible, with a black top, would arrive at the Golden Lion Restaurant on Santa Monica Boulevard at approxi-



mately 9:00 P. M. that night [R. T. 10-11]. The car would have Massachusetts license plates and one of the occupants would be Robert Schroeter, alias Red Kelly [Red Kelly [R. T. 11]. The car was supposed to be stolen and had been offered to the informant for \$400 [R. T. 11]. The driver was described as a male caucasian, slender, dark complected [R. T. 11], and was from the San Francisco area [R. T. 41].

Prior to March 30, 1966, Wheeling had been told by two Federal Agencies that the informant "was absolutely reliable and had proven so to these federal agencies on numerous occasions in the past" [R. T. 12]. Wheeling was told the informant had earned \$20, 000 during 1965 in informant's fees [R. T. 12]. Personnel of the Post Office Department had told Wheeling that the informant had broken several rings, "including a large forgery and counterfeiting ring located in Canada, and that he managed to recover large quantities of counterfeit currency, of stolen bonds, and other related-type violations [R. T. 165]. Wheeling was also told by a Postal Inspector that the informant "had been on numerous operations with the Federal Bureau of Investigation on which agents had been, at least on one occasion, an agent was shot; that he was considered to be top notch and a very unusual type of person, but very reliable as a source of information relating to the workings of the underworld" [R. T. 165].

Wheeling's personal dealings with the informant were that in the three week to one month period prior to March 30, the informant had given him information [R. T. 12]. In each instance



when information was received by Wheeling, he verified it personally [R. T. 12].

As a result of information received by Wheeling from the subject informant, five persons were arrested for armed robbery of a jewelry store in the San Fernando Valley, three persons were arrested in possession of a half million dollars' worth of stolen bonds, three persons were arrested and \$29, 500 worth of American Express money orders were recovered, and two other persons were arrested for armed robbery [R. T. 13].

Wheeling considered the informant to be a very valuable source of information [R. T. 13].

On March 28, 1966, the informant had told Wheeling that Red Kelly and the driver of the car on the 30th, had come to the informant for the purpose of borrowing a gun so Kelly and the driver could rob a jewelry salesman in the Beverly Hills area [R. T. 162-63]. Wheeling, in conjunction with the Beverly Hills Police Department, conducted surveillance and saw Schroeter, aka Kelly, following the salesman [R. T. 163].

Around 6:00 P. M. on March 30, Wheeling telephoned Lieutenant Kenneth R. Hayes, of the Los Angeles County Sheriff's Office and requested his help at the area of Spaulding and Santa Monica at 9:00 P. M., relative to a stolen 1965 Thunderbird, red in color [Testimony of Hayes R. T. 184-85; Testimony of Wheeling R. T. 14-15; 42-44].

At approximately 9:00 P. M. on March 30, 1966, Sergeant Wheeling, along with personnel of the Los Angeles Police



Department and the Sheriff's Office observed a vehicle matching the description given by the informant, with Red Kelly in the car [R. T. 16]. The vehicle's escape was blocked and Wheeling approached the driver [R. T. 17-19], the defendant Toohey [R. T. 22]. The following colloquy took place:

1. Wheeling asked the defendant for his operator's license [R. T. 22].
2. The defendant said, "I don't have one" [R. T. 22].
3. Wheeling asked Toohey for his registration on the vehicle [R. T. 22].
4. Toohey said, "No" [R. T. 23].
5. Wheeling asked to whom the car belonged [R. T. 23].
6. Toohey said, "I don't know" [R. T. 23].
7. Wheeling asked where he got the car [R. T. 23].
8. Toohey said he borrowed it from "[s]ome guy in a bar named Jerry" [R. T. 23].
9. Wheeling asked, "What bar ?" [R. T. 23].
10. The defendant said, "I don't remember" [R. T. 23].
11. Wheeling asked for Jerry's last name [R. T. 23].
12. Toohey said, "I don't know" [R. T. 23].
13. Wheeling asked where the bar was located.
14. Toohey said, "Somewhere in Hollywood. I don't know exactly" [R. T. 23].

At that time Wheeling told Toohey to get out of the car and place his hands on top [R. T. 23]. At that time Wheeling told Toohey he was under arrest and Wheeling saw an officer holding



a pair of license plates on the other side of the vehicle [R. T. 23], California license plates [R. T. 24].

After Sergeant Wheeling told Toohey to get out of the car and told him he was under arrest, Wheeling advised Toohey that he had the right to remain silent, anything he said could be used against him in a legal proceeding, and he was entitled to an attorney prior to making any statement [R. T. 155-56]. Toohey said he understood his rights [R. T. 156].

Michael B. Moore, a deputy sheriff, impounded the Thunderbird at Spaulding and Santa Monica that night and as part of the impounding procedure took down the vehicle identification number -- 4Y85Z190110 [R. T. 180-81], as had Wheeling [R. T. 174].

Wheeling, at the hearing on the motion to suppress, described the area of the Golden Lion as one "very active for law enforcement officers" [R. T. 150].

On April 1, 1966, Special Agent Gerald F. Moore, of the Federal Bureau of Investigation, received a phone call from Sergeant James Heinsdorff of the Burglary - Auto Theft Detail of the Los Angeles Police Department who told Moore of the vehicle and its license number and vehicle identification number -- 4Y58Z190110 [R. T. 198-99].

Moore, on April 4, 1966, after advising Toohey of his constitutional rights, except for the right to have a free attorney appointed then and there, asked for and received the address of the defendant [R. T. 191-93]. Moore's reasons were at least



two-fold: (1) to locate Toohey in the event he became a fugitive, and (2) to conduct a neighborhood canvass relative to the crime [R. T. 194].

Judge Jesse W. Curtis made the factual finding that Toohey was not under arrest at the time of his initial stopping and questioning on March 30, 1966 [R. T. 59]. Judge Curtis found:

"Up until the time the license plates were shown to the defendant that the investigation was purely in the investigatory stage, and the accusatory stage did not occur until the time of the arrest, the license plates being the thing that in the mind of the officer cinched the identification."

Judge Delehant, it is submitted, found that any persons found as a result of an address were so attenuated as to not be tainted by an assumed taint [R. T. 196].

#### ARGUMENT

- A. THERE WAS PROBABLE CAUSE FOR THE STOPPING AND EVENTUAL ARREST OF TOOHEY.
- 

At the time Toohey was stopped the police had information that the car was stolen; it had been offered for sale at \$400; it was a red 1965 Thunderbird convertible with Massachusetts plates; Red Kelly and a dark-completed slender man would be in it; and the car would be at the Golden Lion at 9:00 P. M.



The information received by the police had come from an informant whose reliability had been verified and vouched for on numerous occasions, and, in particular, was verified when the described car appeared at the predicted time with the predicted occupants.

Factually, and legally, Draper v. United States, 358 U.S. 307 (1959), tells us that there was probable cause to make an arrest in the instant case.

In any event, Sergeant Wheeling confirmed in his own mind the fact that the car was stolen by virtue of the colloquy that took place between himself and Toohey prior to the arrest.

It is noted that Judge Curtis made the finding that the matter was in the investigative stage up until the time Wheeling saw the California plates in the hand of another officer after they had been removed from the car.

Appellant urges that Toohey was under arrest from the moment he was stopped.

Not every stopping of an auto by a police officer is an arrest of the driver. United States v. Bonanno, 180 F. Supp. 71, 80 (S. D. N. Y. 1960), rev'd on other grounds sub nom., United States v. Bufalino, 285 F. 2d 408 (2nd Cir. 1960). The principle that the police may routinely interrogate an individual without arresting him was also recognized in Rios v. United States, 364 U.S. 253 (1960). The Court's attention is directed to Busby v. United States, 296 F. 2d 328 (9th Cir. 1961), cert. den., 369 U.S. 876 (1962). In Busby, at 332, this Court stated that it agreed with



Bonanno, supra., and, further, that not every stopping is deemed an arrest.

Appellant says that since he was effectively restrained when first stopped then that must be the time of the arrest. The recent case of Terry v. Ohio, \_\_\_\_\_ U. S. \_\_\_\_\_ 3 Cr. L. 3149, decided June 10, 1968, holds that police may, if they believe a crime has been or is about to be committed, the right to detain a person and investigate the situation. Terry also holds that during such detention the police have a right to protect themselves. In light of the fact that Wheeling knew that Kelly and his companion tried to borrow a gun for the purpose of a robbery two days earlier, coupled with the fact that the area of stopping was one "very active" for law enforcement, anything less than the use of shotguns would have been foolish on the part of the police.

This court, in Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966) said, at 928:

"There is nothing ipso facto unconstitutional in the brief detention of citizens not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations; and the test of the validity of such brief detention is whether from the totality of this circumstance, it appears that the detention was based upon 'reasonable grounds' and was not arbitrary or harassing."



It is submitted that the police in the instant case acted perfectly reasonable under the circumstances.

B. THE PROSECUTION WAS ENTITLED TO INTRODUCE THE VEHICLE IDENTIFICATION NUMBER INTO EVIDENCE.

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At the time of the arrest, the vehicle in question was impounded by the Los Angeles County Sheriff's Office, and, as part of the impounding procedure Michael Moore wrote down the vehicle identification number on his impound sheet. Prior to that Sergeant Wheeling wrote down the same number contemporaneously with the arrest. In any event, on April 1, 1966, Special Agent Gerald Moore, of the F. B. I., was provided with the number by Sergeant James Heinsdorff of the L. A. P. D. Burglary-Auto Theft detail. On April 5, 1966, Moore, of the F. B. I., went to the impound lot and, without a search warrant, took down the number again.

Assuming arguendo, that Preston v. United States, 376 U. S. 364 (1964), makes Gerald Moore's obtaining of the number illegal, the number was obtained from independent untainted sources -- the search at the time of the arrest, and the impound report. Wong Sun v. United States, 371 U. S. 471 (1962); Nardone v. United States, 308 U. S. 388 (1939). Even if Moore's obtaining of the number was wrong, the number itself was admissible.



C. THE DEFENSE WAS NOT ENTITLED  
TO THE IDENTITY OF THE INFORMER.

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Toohey relies on Roviaro v. United States, 353 U.S. 53 (1957), for the proposition that he was entitled to know the identity of the informer at the hearing on the motion to suppress. While appellant cites Roviaro at page 61, for the proposition that for a test of probable cause the accused is entitled to such identity, it is clear that such language of Roviaro is dicta. Rugendorf v. United States, 376 U.S. 528 (1964), at page 535, line 5, states that "reliance on Roviaro for suppression purposes, . . . [is] entirely misplaced."

It is the law of this Circuit that the trial judge has discretion in revealing the name of an informant. Costello v. United States, 298 F.2d 99 (9th Cir., 1962); cert. den., 376 U.S. 930; Newcomb v. United States, 327 F.2d 649 (9th Cir. 1964), cert. den., 377 U.S. 944. As Costello points out, the question is whether or not, without the informant, the prosecution can demonstrate that they had probable cause and the right to rely on such information. It is submitted that the reliability of the informant and his existence are amply demonstrated by the statement of facts, supra.

Appellant says he was entitled to know the name of the informer because of "his own participation in the offense" [Op. Brief, p. 9]. Appellant offers proof of such participation because "the informer had been offered the car in sale by the appellant"



[Op. Brief, p. 10]. Such argument overlooks the fact that the offense charged is transportation, and concealment, not disposition.

As appellant concedes, the duty is on the appellant to show the participation, and such has not been done in the instant case.

As this Court said in Powell v. United States, 386 F. 2d 386 (9th Cir. 1967), at 387-88:

"A rule that any person who merely informs the officers of the commission of a crime must be disclosed to the accused as the one responsible for his arrest would serve to encourage the criminal to wreak his vengeance on the informer. Such information might be hard to come by; and such a rule would seriously hamper accepted police investigative techniques.

"If there was an informer in this case, there is nothing to show that he was more than a mere observer, not a participant." . . .

D. MIRANDA DOES NOT REQUIRE THE SUPPRESSION OF TWO WITNESSES FOUND FROM AN ADDRESS WHICH WAS LAWFULLY OBTAINED BY THE POLICE AND THE F. B. I.

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The arrest in the instant case took place on March 30, 1966, and at that time Sergeant Wheeling fully and properly advised Toohey of his rights [R. T. 155-56]. The F. B. I. interviewed Toohey



on April 4, 1966, and again advised him of his rights [R. T. 191]. The F. B. I. obtained the defendant's address on April 4 in an interview. The police obtained it as part of the normal booking procedure on March 30 [R. T. 156].

In any event, the F. B. I. went to the address in a routine neighborhood canvass and eventually located Mrs. Harris and Mrs. Kitzler [R. T. 109-P].

The novel theory advanced by the defendant is that even though the address was obtained during routine booking and also after being properly advised of his rights as of the time of the warning, Miranda makes evidence obtained from a mere address inadmissible. It is submitted that neither Miranda, or any other case, so holds. It is incontestable that, at the time, Toohey was given a full and proper warning. It is further incontestable that no admissions made by Toohey were introduced at the trial.

Nowhere in Miranda does it say that the fruit of an otherwise valid statement may not be used after Miranda, or that statements previously obtained according to Escobedo become illegal or unconstitutional. Johnson v. New Jersey, 384 U. S. 719 (1966) merely holds that statements obtained before June 13, the date of the Miranda decision, may not be introduced after June 13, not that the statements are ipso facto illegal or unconstitutional or tainted in any way. For this Court to so read Miranda would be an unwarranted extension of Miranda and would castigate officers who did everything right at the time.



While it is the basic position of the United States that Miranda does not apply, it is submitted that a mere address, assuming arguendo that it is tainted, is so far attenuated from witnesses found in a neighborhood canvass at that address that the primary taint would be purged. Between the address and Mrs. Harris and Mrs. Kitzler there are intervening factors such as investigation, the free will of the witnesses, time, and the memory of the witnesses. To say that such witnesses are not products of their own free and voluntary will would be a complete distortion of Wong Sun, supra; and Nardone v. United States, supra. As appellant reads the Reporter's Transcript at pp. 195-97, so does the appellee. Judge Delehant found a break in the casual chain between the address, per se, and witnesses found at or near the address.

It is further submitted that the mere address of a defendant is not covered by the Fifth and Sixth Amendments because it is mere identifying information. See Gilbert v. United States, supra. As Judge Curtis said,

"[An address of a defendant] is the type of identifying information which just isn't protected by Miranda . . . Like fingerprints or anything else."



E.

CONCLUSION

For the above stated reasons this judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 22,778

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD  
Petitioner

v.

GEORGE PEARCE, d/b/a G. P. TRUCKING COMPANY,  
Respondent

---

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL  
LABOR RELATIONS BOARD

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BRIEF FOR GEORGE PEARCE, d/b/a G. P. TRUCKING COMPANY

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FILED

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## INDEX

	<u>Page</u>
STATEMENT OF THE CASE . . . . .	1
ARGUMENT	
I. There is no substantial evidence on the record as a whole which supports the Board's finding that Floyd Sims was discharged in violation of Section 8(a)(1) of the Act. . . . .	3
II. There is no substantial evidence on the record as a whole which supports the Board's finding that Carl Reagan was discharged in violation of Section 8 (a)(1) of the Act. . . . .	7
III. There is no substantial evidence on the record as a whole which supports the Board's finding that William Crider was discharged in violation of Section 8 (a)(1) of the Act. . . . .	10
IV. Law as it pertains to facts . . . . .	18
CONCLUSION . . . . .	24



## AUTHORITIES CITED

## CASES:

STATUTE:

Constitution of the United States - First Amendment 23



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STATEMENT OF THE CASE

Respondent (hereinafter called Pearce) desires to add a few significant additions to the Board's statement of the case. Before doing so, we should point out to the court that the references to the transcript set forth in the Board's brief, wherein Pearce and his dispatcher,



Delbert Williams (hereinafter called Williams), are alleged to have committed unfair labor practices, are always references to the testimony of the Charging Party's witnesses. Little purpose can be served by pointing out to the court that Pearce and Williams testified at variance with said witnesses.

The Board's brief starting on page 3 mentioned the alleged unlawful interrogation of Floyd Sims by Williams. It might be well at this point to call to the court's attention the testimony of Mr. Sims and the Trial Examiner's reaction to it, which could hardly have been otherwise. On pages 80-84 of the transcript Sims is cross-examined by employer's counsel. The testimony there shows that Sims had applied for employment at Metzler Trucking Company on March 2, 1966, which was four days before his alleged troubles with Pearce and six days before he was alleged to have been discharged by Pearce for union activity. Pearce at all times testified that Sims was not discharged at all but that he quit and stated that he had other employment.

Sims jumped from one fabrication to another on redirect examination and under examination by the Trial Examiner (Tr. 105-109). The Trial Examiner on page 10 of his decision, which was adopted by the Board, at line 31 found that Sims did, in fact, file an application



for employment on March 2, 1966.

The so-called anti-union petition quoted on page 7 of the Board's brief was requested by employees of Pearce (Tr. 232).

#### ARGUMENT

##### I.

THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S FINDING THAT FLOYD SIMS WAS DISCHARGED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

At the outset we feel constrained to point out to the court, as we repeatedly did in our exceptions to the Trial Examiner's decision and brief in support thereof, that in no single instance did the Trial Examiner make a finding in favor of Pearce. He strained at every gnat and swallowed every camel in order to twist each finding against Pearce. He even did this with respect to the witness Sims, whose testimony is above referred to and will be further discussed below. In some of these instances there was no substantial evidence as required, or any evidence at all, upon which to base the decision of the Trial Examiner which was adopted by the Board as its decision.

We submit that in the case of Mr. Sims the credibility of his testimony can be determined more by written exhibits in his own handwriting (Resp. Exh. 2) and his



ridiculous efforts to explain the obvious fact that what he said on direct examination and what he had recorded at Metzler Trucking on March 2, 1966 were irreconcilable, than by attempting to argue the merits of his many charges which were denied by Pearce and Williams. This man testified that he was discharged but made no mention on direct examination of applying for other work on March 2, 1966 before the alleged discharge on March 8, 1966. It was agreed by all witnesses that Sims worked for Pearce until March 6, 1966.

Probably the best example of his complete irresponsibility as a witness appears on pages 108 and 109 of the transcript where he was being examined by the Trial Examiner. Starting with line 13 on page 108, the testimony is as follows:

TRIAL EXAMINER: Well, when you put down March 2, did you think it was the correct date?

THE WITNESS: I couldn't say I even thought about the date, sir.

TRIAL EXAMINER: How did you come to pick March 2?

THE WITNESS: Just by pencil and just writing.

TRIAL EXAMINER: You just pulled the date out from the air and wrote it down?

THE WITNESS: In the past date, yes.

TRIAL EXAMINER: I am talking about when you filled out that application.



THE WITNESS: Well, I'd rather backdate as postdate it.

TRIAL EXAMINER: Why didn't you put the correct date down?

THE WITNESS: That I don't know.

TRIAL EXAMINER: You say you didn't know whether March 2 was right?

THE WITNESS: Well, it had to be the wrong date, sir. But at the time I didn't let -- just like I say, I didn't think the date was so important as the job was.

TRIAL EXAMINER: Mr. Sims, I must advise you that the answers that you are giving me are not very satisfactory answers. Is there anything like on this subject you would care to say?

THE WITNESS: I knew at the time that I was backdating the application.

TRIAL EXAMINER: Will you tell me why?

THE WITNESS: The reason why I don't know. I just backdated it.

TRIAL EXAMINER: Surely you had a reason for backdating it?

THE WITNESS: I don't know why it would be.

TRIAL EXAMINER: Do you normally backdate things?

THE WITNESS: Well, at times, yes, sir.

TRIAL EXAMINER: For any particular reason?

THE WITNESS: No, sir.

In view of such testimony, it certainly is no wonder then that the Trial Examiner and Board, starting at line 25 on page 10 of the decision found Sims to be "evasive" and ". . . not a reliable witness."



The obvious truth is that Sims quit his job on or about March 6, 1966 after applying for work at Metzler and several other trucking firms, including West Side Trucking, on March 2, 1966. He was in an excellent position to stop at Metzler's any time he chose for he drove past it several times a day while hauling for Pearce (Tr. 119). He got a job at West Side Trucking Co. so quit just as Pearce and Williams testified.

The truth on the question of when Sims applied for and got a job elsewhere goes to the very essence of the charge he was discharged for union activity as opposed to quitting his job. If he applied for other work, which we know he did on March 2, 1966, then he very likely got the job then and was, in fact, ready to quit on March 6, 1966. Even here we must point out that not only Pearce said he tried to get the man to take a few days off rather than quit, but Sims said the same thing (Tr. 96).

Mr. Sims, as well as employees Crider and Millican, made several unguarded statements, to which we would like to call the court's attention, which were in sharp conflict with their rash of complaints against Pearce and which often substantiated the testimony of Pearce or portrayed him as being an employer completely at variance with the one these witnesses tried to paint. Mr. Sims stated that his job was a good job (Tr. 60)



and that he was the one who raised the hospital and dental plan question (Tr. 60). The latter statement bore out the contention of Pearce.

## II

THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S FINDING THAT CARL REAGAN WAS DISCHARGED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

The Board's brief leaves out any references to the testimony of Pearce which actually lead to the discharge of Reagan, which immediately preceded it, and demonstrated what Pearce meant when he referred to Reagan as arrogant and trying to take over the company. The testimony to which we refer is the testimony of Pearce concerning the reckless and contemptuous conduct of Reagan on the day before his discharge and the fact that on the day of his discharge Pearce observed Reagan going through a stop sign (Tr. 237-239). Surely it can not be said that Pearce was discharging this arrogant man because of his union activity because, as pointed out in the Board's brief, one week previous to the discharge and after Reagan's activity was well known, he, by his own admission, was urged by Pearce to remain on the job after Williams had allegedly fired him (Tr. 18). If Pearce had been looking for a chance to get rid of this man because of union activity, he had it when Reagan said, ". . . I was leaving."



(Tr. 18) Instead, Pearce prevailed upon Reagan to stay and kept him until he was obviously an intolerable threat to the driving public, as well as this employer's equipment and contract with Spreckles Sugar Company. If Reagan was discharged for not signing the petition that Pearce prepared at the suggestion of some of the employees, then why were Reagan and Sims not fired the same day? All of the evidence points to the fact being that Sims' name was scratched off the list of signatures to the petition because he quit his job the day he signed and Reagan stayed on until his actions as a driver were intolerable.

The testimony of all parties, including Reagan (Tr. 22-23) reflects no pressure put on this man or objections by Pearce or Williams when Reagan refused to sign. On the contrary, all evidence indicates that signing was voluntary in the spirit of the philosophy of freedom of choice as expressed by Pearce (Tr. 244) and his policy of not discriminating (Tr. 264). These statements could be called self-serving, but in looking for evidence from the opposition to corroborate them, it is certainly found in the testimony of employee Millican, where, with respect to signing a union authorization card, he quoted Pearce as saying, "That's your American right." (Tr. 204) In this regard, there was further evidence from the employer's witness Floyd Covey of Spreckles Sugar Co. who



was present when all parties signed, which corroborated the fact that no pressure was exerted against any employee to sign the petition (Tr. 307-10).

To build a case against the employer with respect to the discharge of Reagan, counsel for the General Counsel sought to show through Charles Chastain of Cal-Farm Insurance that Pearce must have instigated the restriction of Reagan from his insurance policy. We earnestly submit that this effort and the rulings thereon by the Trial Examiner, which were adopted by the Board, constitute a serious and reversable error. We will deal briefly with this question at this point and go into more detail in regard to the discharge of William J. Crider later in this brief since, it seems to us, the case with regard to Crider rests entirely upon the improper admission of purely hearsay testimony from the witness Chastain.

Aside from the question of error with respect to the admission of the testimony of Chastain, the effort through him to show that Pearce must have instigated the restriction of Reagan from the policy falls on its face when we consider that Reagan had not worked for Pearce for one and a half months before Pearce is supposed to have caused Reagan to be restricted. In addition, the beet-hauling season was about to end and Reagan would have thereupon ceased to be an employee in any event. The testimony of



Mr. Chastain commences on page 384 of the transcript.

With respect to the witness Chastain, Pearce, for some reason contrary to accepted practice in other legal fields, did not have the equal benefit of statements of Chastain secured by a NLRB investigator. This certainly puts an employer at an unfair disadvantage. The result is that on the spur of the moment he is required to answer alleged facts kept secret from him, and naturally does not wish to delay the hearing interminably by postponements to get additional witnesses who might be in faraway places or whose whereabouts might be unknown.

### III

THERE IS NO SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE WHICH SUPPORTS THE BOARD'S FINDING THAT WILLIAM CRIDER WAS DISCHARGED IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

Respondent in this proceeding believes that the Board found the discharge of William Crider to be a violation of the Act on the basis of no real evidence at all, except the admittedly hearsay testimony of Charles Chastain. Without the hearsay testimony of Chastain, the alleged wrongful discharge is based on unfounded inferences and the pure opinion of the Trial Examiner. Mr. Chastain testified that a Mr. Mueller told him certain things of which he made brief notes on G.C. Exh. 11. Mr. Mueller was never produced as a witness for the



Charging Party and no reason was presented for this failure and the consequent lack of opportunity for cross-examination by the employer's counsel. The employer's counsel objected to the admission of the notes and of the witness's testimony therefrom except to prove the fact a phone call was made to the witness (Tr. 394-395). The Trial Examiner then stated: "I will accept it solely to establish the fact that this phone call was made to the witness." (Tr. 395, lines 14-15) After further questions and answers, the counsel for the General Counsel then proceeded not only to be content with proof that a call was made, but insisted upon having the witness testify to the substance of what Mr. Mueller said. Upon further objection by employer's counsel, the Trial Examiner then stated: "I am going to overrule the objection and accept the testimony to show that certain matters were stated to the witness, but I am not going to permit these matters to have probative weight." (Tr. 396-400)

We submit that the Trial Examiner was clearly attempting to go in two directions at one time. After the Trial Examiner's above-mentioned ruling, which appears on page 398, lines 11-14 of the transcript, he then proceeded to allow the handwritten notes which resulted solely from what Mueller told the witness to be the sole explanation and reason for Chastain's writing G.C. Exh. 9. G.C. Exh. 9



in turn is the only possible substantial evidence to sustain the charge of wrongfully discharging Crider (Tr. 403).

Now let us take a look at the Trial Examiner's decision which was adopted by the Board. On page 14, line 7, the Trial Examiner is quoting the text of the pure hearsay he admitted in evidence as proof -- not of the fact a call was made, but of the facts alleged to have been so stated by the absent Mueller to Chastain. This abuse by the Trial Examiner again appears on page 14 of his decision at lines 35-36. This error is compounded by the fact Chastain's sworn testimony makes it abundantly clear that he had no actual recollection at all of what was said during the hearsay conversation. His cold notes were obviously the only evidence before the Trial Examiner, and they were only notations of a conversation with a third party, and, as pointed out, were hearsay in the purest form.

The facts as shown by the evidence are that Pearce let Crider go only the day before the season ended (Tr. 158 and Tr. 251) and that Williams went so far as to suggest that Crider go to Sacramento and try to get his driving matters straightened out. Crider chose to do nothing but draw his unemployment insurance (Tr. 159) until the Charging Party decided the Crider case could



be used as further harrassment of Pearce. Please note that Crider saw Williams after he had been told by the latter he would not be rehired and should try to get the matter straightened out but Crider did not even mention the subject of his employment to Williams (Tr. 162-163). The testimony showed that it was common knowledge that other drivers had had the same problem as Crider and straightened the matter out (Tr. 250). Crider was not taken off the job until Pearce had received official notice from his insurance carrier that coverage as to Crider had been cancelled (Tr. 245-246). It should be noted that Crider did not on direct or cross-examination say that he was discharged or fired -- only that he would not be rehired (Tr. 262) and that he should try to get his traffic citation problem straightened out (Tr. 161). Crider knew other drivers had had the same sort of problem and that something could be done (Tr. 170). There was certainly no reason to go through a circuitous route of instigating the cancellation of insurance on Crider and then having to actually fire him because of it when there was only one-half day of the hauling season left.

At this point we should point out to the court that the real leaders of the union movement, such as the witness Millican for the Charging Party, were not fired. Millican, in fact, even acted as the union's observer



at the election (Tr. 258-259) and yet not only was not fired, but continued to receive the highest pay of any of Pearce's drivers (Tr. 273). It is hard to find anything in the transcript concerning Pearce's alleged unfair discrimination which is not cast under a shadow of the greatest suspicion as to veracity by these uncontradicted facts concerning Millican. Aside from this resulting suspicion and doubt concerning the veracity of the Charging Party's witnesses, there is, with respect to Crider, the simple fact that when the season ended the day after Crider's forced discharge, Pearce would then no longer be his employer and could simply have eliminated this man, if that was his plan, by not rehiring him when Pearce commenced operations in the future. In this regard, however, Pearce stated under oath that he would rehire Crider if Crider could get himself reinstated with the insurance company, and that Pearce had made the same statement long previous to the hearing when interviewed by an investigator from the NLRB (Tr. 251).

Toward the end of Crider's testimony there are several pages of loose talk that clearly show that when reminded of his reason for testifying, he could find nothing but fault with Pearce, in contrast to his off-guard statements that Pearce was a truthful man (Tr. 143) and a "top-flight" employer (Tr. 154). While this over-eager witness



denied any threats of violence because he only weighed 180 pounds, it is submitted that he is exactly the type that would get carried away when feeling important and threaten to do the things Wallace Williams, Jr. testified to (Tr. 372 and Tr. 375).

It is interesting to note that Crider claimed to have been present at all three of the meetings Pearce had with his men. He also appeared to know the other men's stories better than they did, but we believe Crider was actually so carried away by his imagined importance that he filled in many a detail that simply seemed logical or necessary to this talkative man in order to make a case. It is obvious that Crider jumped at faulty conclusions concerning the question of whether Pearce was going to sell his trucks. We submit that it was from this entirely erroneous conclusion of Crider that the whole subject of selling out because of the union and putting the employees out of work probably arose. We know that Crider testified in considerable detail about the fact that he really pushed the idea of unionization when he thought he discovered a conspiracy on the part of Pearce to sell out and leave the men without work (Tr. 157). We know, of course, that Pearce did not sell any equipment and that the Metzler matter referred to by Crider (Tr. 155-156) involved nothing more than the leasing of a couple of Pearce's



trucks to Metzler after the season was over, which simply gave Pearce's employees work they otherwise would not have had (Tr. 259-260 and 262-263).

We urge upon the court the fact that Pearce did not employ any truck drivers between the first of May and approximately July 18, 1966 and yet he voluntarily rehired all of the men who were available, including those whom he knew to be most active in the union movement (Tr. 235-236). This rehiring could have included Crider had he wanted to correct his problem and come back to work.

Mr. Chastain repeatedly stated that he had no independent recollection of the contents of his conversation with Mueller (Tr. 399) yet after being constantly lead in detail by counsel for the General Counsel and after being embarrassed with his alleged contradiction between his earlier statement to a NLRB investigator and his testimony, he then saw fit to even go so far as to place Pearce in the presence of Mueller at the time the latter telephoned Chastain. This was denied by Pearce. Such an alleged recollection is certainly not reflected in his notes on G. C. Exh. 11. In fact, his notes clearly indicate that Mueller contacted Pearce and learned that Pearce said Williams is O.K. and that Crider and Reagan were not safe drivers. This comment is then followed by a period, followed by the words "Will ask for restriction of them."



The only logical explanation of this old note is that Mueller was late in getting his information to Chastain and that it was Chastain, not Pearce, who decided to ask for the restriction.

Crider, along with other witnesses, testified to a rash of alleged threats and promises by Pearce, but we respectfully submit that the evidence when taken as a whole clearly shows that Pearce did nothing more than offer to sell his employees his trucks on some form of workable basis since they appeared to be dissatisfied. This, we submit, does not constitute offering increased wages or preferred conditions of employment or fringe benefits. In addition, he apparently answered inquiries concerning a hospitalization plan and a bonus. The hospitalization plan had been previously discussed so was not anything new. Furthermore, Pearce was answering the employees' questions, and we can find nothing in the Act which prohibits this response. With regard to the bonus, the truth is that Pearce in answering employees' questions simply stated that there might be a bonus but that he wouldn't guarantee that there would be one. This reflected nothing different from his past practice (Tr. 230-231). Furthermore, Pearce pointed out that questions concerning the bonus were extremely frequent to the point of becoming suspicious as to the real motive involved (Tr. 230-231).



231).

With respect to the petition, the evidence is that it was prepared at the request of several employees. (Tr. 232). Logic certainly dictates that this is the way it must have happened, for we must keep in mind the testimony of Crider where he stated Pearce said, "'Now, fellows, it is up to you.'" (Tr. 143-144) When the matter was left that way, it is obvious that something was instigated by the employees and that Pearce was merely following their direction. After all, it is unlikely that a truck driver would have a typewriter available to prepare his own petition. All of the evidence shows that at the time the petition was signed nobody is alleged to have threatened drivers in order to get their signatures.

#### IV

##### LAW AS IT PERTAINS TO FACTS

1. The Board is entitled to draw reasonable inferences from the evidence but it can not create inferences where there is no substantial evidence upon which the inferences may be based.

N.L.R.B. v. Kaiser Aluminum & Chem. Corp., 217 F.2d 366, 368 (C.A. 9; 1954).

In this case the court on page 368 states as follows:



"Discrimination relates to the state of mind of the employer. 'The relevance of the motivation of the employer in such discrimination has been consistently recognized \* \* \*.'<sup>1</sup> The General Counsel had the burden of the issue. Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, (2) to show that the employee was discharged because he had engaged in protected activity, and (3) to show the discharge had the effect of encouraging or discouraging membership in a labor organization. Although the Board is entitled to draw reasonable inferences from the evidence, it cannot create inferences where there is no substantial evidence upon which these may be based. Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge 'for any reason other than union activity or agitation for collective bargaining with employees'<sup>2</sup> need not justify or excuse his action."

Shattuck Denn Mining Corp., (Iron King Branch)

v. N.L.R.B., 362 F.2d 466 (C.A. 9; 1966).

In this case the above court stated on page 469 that inferences must be based upon evidence and cited the above Kaiser Aluminum case. In the Shattuck case this court also made the very cogent point that the Board may not infer an unlawful motive if the evidence clearly supports an inference of lawful motive and cited the case of N.L.R.B. v. Huber & Huber Motor Express, Inc.,

1. Radio Officers' Union of the Commercial Telegraphers Union, AFL v. N.L.R.B., 347 U.S. 17, 43, 74 S. Ct. 323, 337, 98 L.Ed. 251.

2. Associated Press v. N.L.R.B., 301 U.S. 103, 132, 57 S. Ct. 650, 655, 81 L.Ed. 953.



223 F.2d 748 (C.A. 5; 1955). The above court in the Huber case first quoted Section 10(c) of the Act and then went on to state on page 749: "As stated above, the record discloses that there existed several reasons for the unpopularity of Barnett, both with the management and with the Union Officers, and where the Board could as reasonably infer a proper collateral motive as an unlawful one, the act of the management cannot be set aside by the Board as being improperly motivated."

We quote the above important point of law for the following reasons: (1) In the case of the discharged employee Reagan, the evidence is replete with justifiable reasons and lawful reasons for discharge. (2) In the case of Crider, the Board's finding amounts to nothing but an inference based upon what, we believe, to be inadmissible evidence. (3) In the case of Sims, we earnestly contend that there was no discharge because this man quit.

Lozano Enterprises v. N.L.R.B., 327 F. 2d 500, 502-503 (C.A. 9; 1966).

This court in the Lozano case dealt very directly with the prerogative of management in the discharge of employees and made several significant and very logical rulings. On page 502, this court stated as follows:



"Furthermore, an employer's oath that the discharged employee's membership or activity in a union was not the ground for his discharge cannot be disregarded because of a suspicion that he may have lied. There must be impeachment of him or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point." (Emphasis ours.)

On page 503 of the Lozano case, this court stated as follows:

"Misconduct of any degree is a logical and proper consideration in determining which of two employees is the more reliable and desirable."

Surely the evidence indicates that employee Reagan was neither reliable nor desirable.

Again on page 503, this court stated as follows:

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."



Also on page 503 of the Lozano case, this court further stated as follows:

"An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one."

The employer Pearce can not stress upon the court too strongly the belief that the Board simply brushed aside the record as a whole and adopted the Trial Examiner's findings and decision which gave not only little weight, but no weight at all, to each and every thing the employer and his witnesses stated under oath. We submit management was allowed no prerogatives as to discharge; that an unlawful purpose was lightly inferred; and that there was no substantial basis for the inferences in which the Board indulged.

2. A long line of cases holds that mere questioning of employees concerning union membership or activities is not unlawful.

Blue Flash Express, Inc., 1954 NLRB 591;

Trumbull Asphalt Co. of Delaware, NLRB v. 327 F.2d 841;

NLRB v. Fullerton Pub. Co. (CA 9; 1960) 41 L C 16,610;

Weingarten, Inc., NLRB v. (CA 5; 1964) 50 L C 19, 365,  
339 F. 2d 498.

3. An employer has the right to interview various groups of employees concerning grievances and reasons



for wanting a union.

Plywood Plastics Co., 1954 110 NLRB 306; Cooper Co., 1962 CCH NLRB 10, 987, 136 NLRB 142.

4. Insignificant interrogation as to union membership is not unlawful.

NLRB v. Coca Cola Bottling Co., (CA 7; 1964)  
49 L C 19, 037, 333 F. 2d 181.

5. An employer has the right of free speech under the Act, and the evidence in this case doesn't warrant a holding Pearce went beyond that right.

NLRB v. Rockwell Mfg., (CA 3; 1959) 38 L C 65811,  
271 F. 2d 109.

To be denied the right of free speech the employer's statements must be coercive in some manner. How can it be said anyone was coerced here in view of Pearce's stated views on a man's right to unionize and Charging Party's own witnesses verifying this attitude of Pearce?

In this same context the First Amendment of the Constitution of the United States protects an employer if his statements fall short of coercion.

NLRB v. Corning Glass Works, (CA 1; 1953) 23 L C 67, 619, 204 F. 2d 422.

If employees are free to make their own decision, employer's remarks are not coercive.



Teamsters Local 200 v. NLRB (CA 7: 1956) 30 L C  
69, 959, 237 F. 2d 233.

All of the testimony, and particularly that of Crider (Tr. 143-144) shows that Pearce was not interfering with the employees' "American right", as he put it, to make their own determination with respect to the union.

6. An employer has the right to prefer one union over another. There was some testimony concerning a preference for a winery union.

Rold Gold of California, Inc., 1959 123 NLRB 24.

In the Rold Gold case the Board stated that it had been Board policy to hold that an employer need not remain neutral in an election campaign but may express a preference between competing labor organizations.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that no decree should issue enforcing the Board's order in full or in part.

We particularly urge that no order should issue enforcing the Board's order with respect to any of the three discharges.

PETTITT, BLUMBERG & SHERR,

By   
Attorneys for Respondent

September 1968



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

NATIONAL LABOR RELATIONS BOARD,  
Petitioner

v.

GEORGE PEARCE, d/b/a G. P. TRUCKING COMPANY,  
Respondent

---

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

---

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## INDEX

	<u>Page</u>
ISSUES PRESENTED .....	1
STATEMENT OF THE CASE .....	2
I. The Board's findings of fact .....	2
A. The Union attempts to organize the Company's employees; the Company responds with threats, coercion and restraint .....	3
1. Dispatcher Williams coercively interrogates and threatens employees .....	3
2. Owner Pearce promises employees economic benefits if they drop the Union, and threatens to sell his trucks if unionized .....	4
3. Dispatcher Williams threatens employees Sims and Reagan with discharge .....	5
4. Owner Pearce conducts employee meetings and repeats his prior threats and promises .....	6
B. The Company discharges employees Floyd Sims, Carl Reagan, and William Crider .....	8
1. Floyd Sims .....	8
2. Carl Reagan .....	11
3. William Crider .....	13
II. The Board's conclusions and order .....	16
ARGUMENT .....	17
I. Substantial evidence on the record as a whole supports the Board's finding that the Company threatened, coerced and restrained its employees, in violation of Section 8(a)(1) of the Act .....	17
II. Substantial evidence on the record as a whole supports the Board's finding that the Company discharged employees Sims, Reagan and Crider because of their pro-union activities, in violation of Section 8(a)(3) and (1) of the Act .....	20
A. Floyd Sims .....	20
B. Carl Reagan .....	23
C. William Crider .....	25
CONCLUSION .....	28
APPENDIX .....	29

## AUTHORITIES CITED

CASES:

Aeronca Mfg. Co. v. N.L.R.B., 385 F.2d 724 (C.A. 9) . . . . .	23
Daniel Construction Co. v. N.L.R.B., 341 F.2d 805 (C.A. 4), cert. denied, 382 U.S. 831 . . . . .	17
Fields, Edward, Inc. v. N.L.R.B., 325 F.2d 754 (C.A. 2) . . . . .	19
Martin Sprocket & Gear Co. v. N.L.R.B., 329 F.2d 417 (C.A. 5) . . . . .	18
N.L.R.B. v. Ambrose Distributing Co., 358 F.2d 319 (C.A. 9), cert. denied, 385 U.S. 838 . . . . .	17
N.L.R.B. v. Britton, V.C., Co., 352 F.2d 797 (C.A. 9) . . . . .	17, 19
N.L.R.B. v. California Compress Co., 274 F.2d 104 (C.A. 9) . . . . .	19
N.L.R.B. v. Geigy Co., 211 F.2d 553 (C.A. 9), cert. denied, 348 U.S. 821 . . . . .	17
N.L.R.B. v. Harrah's Club, 362 F.2d 425 (C.A. 9) . . . . .	23
N.L.R.B. v. Idaho Egg Producers, Inc., 229 F.2d 821 (C.A. 9) . . . . .	17, 18
N.L.R.B. v. Idaho Potato Processors, Inc., 322 F.2d 573 (C.A. 9) . . . . .	23
N.L.R.B. v. Local 776, IATSE, 303 F.2d 513 (C.A. 9), cert. denied, 371 U.S. 826 . . . . .	20
N.L.R.B. v. Luisi Truck Lines, 384 F.2d 842 (C.A. 9) . . . . .	19
N.L.R.B. v. Movie Star, Inc., 361 F.2d 346 (C.A. 5) . . . . .	19
N.L.R.B. v. Parma Water Lifter Co., 211 F.2d 258 (C.A. 9), cert. denied, 348 U.S. 829 . . . . .	19
N.L.R.B. v. S & H Grossinger's, Inc., 372 F.2d 26 (C.A. 2) . . . . .	19
N.L.R.B. v. Stanislaus Implement & Hardware Co., 226 F.2d 377 (C.A. 9) . . . . .	20
N.L.R.B. v. Victory Plating Works, Inc., 325 F.2d 92 (C.A. 9) . . . . .	23
N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F.2d 920 (C.A. 2) . . . . .	22
N.L.R.B. v. West Coast Casket Co., 205 F.2d 902 (C.A. 9) . . . . .	17, 18, 23
Pittsburgh S.S. Co. v. N.L.R.B., 337 U.S. 656 . . . . .	20
Shattuck Denn Mining Corp. v. N.L.R.B., 362 F.2d 466 (C.A. 9) . . . . .	22

STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i> ) . . . . .	2
Section 7 . . . . .	19
Section 8(a)(1) . . . . .	1, 17, 20
Section 8(a)(3) . . . . .	1, 20
Section 10(e) . . . . .	2

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 22,778

NATIONAL LABOR RELATIONS BOARD,  
Petitioner

v.

GEORGE PEARCE, d/b/a G. P. TRUCKING COMPANY,  
Respondent

---

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

---

**ISSUES PRESENTED**

1. Whether substantial evidence on the record as a whole supports the Board's finding that respondent threatened, coerced and restrained its employees, in violation of Section 8(a)(1) of the Act.
2. Whether substantial evidence on the record as a whole supports the Board's finding that respondent discharged employees Floyd Sims, Carl Reagan and William Crider because of their pro-union efforts, in violation of Section 8(a)(3) and (1) of the Act.

## STATEMENT OF THE CASE

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),<sup>1</sup> to enforce its order issued on June 23, 1967, against respondent George Pearce, d/b/a G. P. Trucking Company. The Board's decision and order (R. 72-73, 33-52)<sup>2</sup> are reported at 165 NLRB No. 140. This Court has jurisdiction over the proceedings under Section 10(e) of the Act, the unfair labor practices having occurred within this judicial circuit. No jurisdictional issue is presented.

### I. THE BOARD'S FINDINGS OF FACT

The Board found that respondent Company, in opposing an organizational campaign by the Union,<sup>3</sup> violated Section 8(a)(1) of the Act by coercively interrogating employees about their union interests and activities, threatening employees with discharge and related reprisals if they chose union representation, promising employees higher wages and other economic benefits in order to induce them to reject unionization, and preparing and soliciting the signatures of employees to an anti-union petition. The Board also found that respondent Company violated Section 8(a)(3) and (1) of the Act by discharging employees Floyd Sims, Carl Reagan and

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<sup>1</sup> The pertinent statutory provisions are reprinted in Appendix A, *infra*, pp. 29-30.

<sup>2</sup> References to the pleadings, decision and order of the Board, and other formal papers reproduced as "Volume I, Pleadings", are designated "R." "Tr.", "G.C. Exh.", and "Resp. Exh." references are to the transcript of proceedings, the General Counsel's exhibits, and Respondent's exhibits, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

<sup>3</sup> Chauffeurs, Teamsters & Helpers, Local 431, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

William Crider because of their pro-union efforts. The facts upon which the Board's findings are based are summarized below.

**A. The Union attempts to organize the Company's employees; the Company responds with threats, coercion and restraint**

Respondent Company is engaged in the trucking business in Mendota, California. George Pearce is owner of the business and Delbert Williams is his dispatcher. (R. 34; Tr. 6, 227, 369, G.C. Exh. 1(e), p. 2.) During late January 1966,<sup>4</sup> the Union attempted to organize the Company's driver-employees. Pearce and Williams, in opposing the organizational effort, resorted to the following conduct:

1. *Dispatcher Williams coercively interrogates and threatens employees*

On January 31, employee Floyd Sims signed a union authorization card and, together with other employees, solicited the signatures of his co-workers (R. 34; Tr. 11-13, 53-55, 124, 128-131, 133-134, 185-186). Thereafter, on February 1 or 2, Dispatcher Williams telephoned his sister Phyllis Sims, the wife of Floyd Sims, and asked her whether Floyd was circulating union cards among the drivers (R. 34; Tr. 124, 343-344). Williams subsequently approached driver Sims and co-workers Carl Reagan, William Crider, Lonnie Chronister and Donald Millican at the Company's Mendota shop, and asked the employees whether they and other drivers had signed union cards (R. 34; Tr. 14-15, 55-57, 79-80, 131-132, 186, 195-196). During his interrogations, Williams admonished the employees that if they wanted a union they should "get out and get [a] union job"; that any driver who signed a union authorization card "would not have a job"; and that the Company, rather than permit the Teamsters to organize

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<sup>4</sup>All dates refer hereinafter to 1966.

its drivers, would "bring in a winery union" which would seek "considerably less" wages for the employees (R. 34; Tr. 14, 16, 56-57, 131-132).

Williams acknowledged before the Trial Examiner that in early February he had been informed that some of the Company's drivers were soliciting signatures on union cards and that he interrogated various drivers as to whether they had signed such cards and, in particular, whether employees Sims and Millican were engaging in union solicitation (R. 34; Tr. 330-332, 364-366). Williams also acknowledged that employees interrogated by him during early February denied signing authorization cards, that he subsequently discovered they had "lied about" their pro-union activities, and that he then confronted them with this information (R. 35; Tr. 364-367).<sup>5</sup> Thus, Williams approached driver Millican and, in the presence of his co-workers, asked Millican why he "had lied to him about the Union". Williams named the drivers who to his knowledge had not signed cards, and again asked Millican whether he had signed a card (R. 35; Tr. 198-200). Millican then admitted signing a card (Tr. 199).

*2. Owner Pearce promises employees economic benefits if they drop the Union, and threatens to sell his trucks if unionized*

During late February or early March, Pearce was advised by a Board agent that the Union had made a sufficient showing of interest to permit a Board-conducted election; Pearce then requested a pre-election hearing which was scheduled for March 15 (R. 35; Tr. 228-229). At about this time Pearce told driver Millican that "he had been doing some figuring, \* \* \* if everything went right, we would have a pretty sizeable Christmas

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<sup>5</sup>At about this time, Williams asked driver Crider if he "knew who had signed union cards", and solicited the employee "to find out" and report the signers to him (R. 35; Tr. 134).

bonus at the end of the year, and \* \* \* that if it was insurance that we wanted \* \* \* he would get us the best insurance policy in the state" (R. 35; Tr. 203-204). Pearce then asked Millican if he "would be willing to drop the Union idea until March 1967" when the employees would have "a chance to vote on it again" (*ibid.*). Millican agreed to "go along with what the rest of [the drivers] wanted to do" (Tr. 204).

During early March, Pearce similarly told employee Sims, in the presence of drivers Millican and Babshoff, that "if the Union didn't come in, it looked like all the drivers could have a nice bonus at the end of the year, and if the Union did come in he'd sell his trucks, all except one \* \* \* and get subhaulers to pull his trailers" (R. 35; Tr. 59). Pearce added that the Christmas bonus would be \$500 to \$600 (Tr. 59-60). Sims explained to Pearce that "all the guys that wanted the Union \* \* \* wanted a hospitalization plan and dental plan" which the Teamsters' contract provided, "and that nobody wanted to lose their job over the Union" (Tr. 60). Pearce replied that "he'd buy a hospitalization plan for the guys if they wanted it" (R. 35; Tr. 61).

### *3. Dispatcher Williams threatens employees Sims and Reagan with discharge*

On March 5, Dispatcher Williams approached employee Reagan and stated, "I thought you said you didn't sign a card" (R. 36; Tr. 16). Reagan apologized for previously denying that he had signed a card, and acknowledged his pro-union sentiments (Tr. 16). Williams then replied (R. 36; Tr. 16-17):

I told you if you want a union, you don't stay around here, \* \* \* get out and get a union job. \* \* \* [I]f you feel that bad about the Union, \* \* \* [a]fter the day, take your truck to the yard and park it.

On the same day, Williams similarly questioned driver Sims about his union interests. Sims indicated that he "would vote for the Teamsters" (R. 36; Tr. 58). Williams then told the employee (Tr. 58), "if [he] felt like that, [he] could take [his] truck to the yard and park it, or else [he] could finish out the day" (Tr. 58). Williams informed Sims that he had told Reagan "the same thing" (*ibid.*).<sup>6</sup> Reagan and Sims understood Williams' statements to mean that they were discharged; however, as shown below, Pearce informed the two employees later that day that they were not fired (R. 36; Tr. 17-18, 58, 61).

*4. Owner Pearce conducts employee meetings and repeats his prior threats and promises*

At the close of work on March 5, Pearce conducted two or three meetings of assembled employees. He requested employees Sims and Reagan to attend one of the meetings. When the two employees informed Pearce that Williams had discharged them earlier that day, Pearce assured them that they were not fired and invited them to remain at the meeting. (R. 36; Tr. 18, 41, 61, 202, 275-278.)

Pearce then told the assembled drivers that he was opposed to the Union, and "if they were dissatisfied \* \* \* [he] was prepared to sell them a part of the business" (Tr. 275-277). Pearce also warned that he would sell his trucks before permitting unionization—unionization would cause him to "park" his trucks (R. 36; Tr. 201-203). Pearce, at the same time, proposed to the drivers that "he would like for [them] to hold off \* \* \* until March, 1967" on voting for the Union; that they "would be getting

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<sup>6</sup>Williams testified below that he "told those two guys \* \* \* that if they didn't stop threatening drivers *and circulating cards*, then, they could park their trucks" (R. 36; Tr. 335-336) (emphasis added).

better bonuses and better wages"; that he would pay for insurance for the drivers; and that "at the end of the year he would sell [them the] tractors and lease the trailers to [them] \* \* \* and pay [them] a reasonable wage until the tractors were paid off". He added that "if everything went all right", they would get a Christmas bonus "anywhere from \$400 to \$700." (R. 36-37; Tr. 201-203, 138-139, 142, 186, 188.) Pearce summed up the meeting by stating (Tr. 140-144):

\* \* \* [I]t is all up to you. We know what we can and what we will have and what we do have. \* \* \* Think it over.

5. *Owner Pearce prepares an anti-union petition for the employees to sign, and again resorts to promises of benefit and threats*

On March 6, Pearce prepared the following petition for his employees to sign (R. 37; Tr. 232-233, 21-23, 63-65, 188, 203, G.C. Exh. 2):

\* \* \*

I am now and have been since January 1, 1966, employed as a truck driver by G. P. Trucking Co. and/or George Pearce Trucking Co. and do hereby state, regardless of any statement written or otherwise that I have made in the past, [sic] do not want the Teamsters Union or any other Union to bargain with my employer for me, or to represent me in any way whatsoever. Nor do I want to vote on this matter again before March 15, 1967, and only then if I so request it.

\* \* \*

Employees were asked by either Pearce or Williams to sign the petition (Tr. 21-23, 63-65, 188, 203). Pearce admittedly was present when 85 to 95 percent of the employees signed (Tr. 232-233). Driver Reagan, however, refused to sign the petition (Tr. 21-23). Driver Sims at first signed

and later scratched his signature off the document (Tr. 63-65, G.C. Exh. 2).<sup>7</sup>

On that same day, Pearce approached employee Reagan and asked him: "Carl, would you like to have a \$600 Christmas bonus if the Union is dropped \* \* \* until March 1967?" (R. 37; Tr. 19-20). Reagan did not answer, whereupon Pearce stated (Tr. 20):

\* \* \* Carl, don't think about anybody else. \* \* \* Don't think about the guys, they won't help you none. \* \* \* You take care of Carl Reagan and Carl Reagan's family.

In like vein, Pearce admonished employee Chronister shortly before the March 31 election (R. 37; Tr. 190): "We're still going to have an election. If you want the Union, go hunt yourself a job, and if you don't, go on and work here". Pearce also promised a number of employees that if they wanted group insurance, he would pay for it after July 1 (R. 37; Tr. 190, 265-267).

#### B. The Company Discharges Employees Floyd Sims, Carl Reagan, And William Crider

##### 1. *Floyd Sims*

Sims was first employed by the Company in 1959 (R. 40; Tr. 53). In late January, he signed a union authorization card and, a few days later, accompanied a number of his co-workers to the Union's hall where they also signed cards (R. 40; Tr. 53-54). On February 1 or 2, Dispatcher Williams asked Sims' wife whether the employee was circulating union cards among the drivers (R. 34; Tr. 124, 343-344). Shortly thereafter,

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<sup>7</sup>Pearce presented the petition at the pre-election hearing held on March 15. The Board representative refused, however, to accept the petition, whereupon Pearce withdrew his request for a hearing and the election was held on March 31 (R. 37; Tr. 232-233).

Williams questioned Sims about “passing out authorization cards”. Sims denied engaging in such activity, and Williams warned the employee that “\* \* \* it was a non-union job \* \* \* and it was going to stay non-union”; that if Sims and his fellow-employees “wanted to work at a union job, [they] could go and get a job at a union place”; and “that any driver [who] did sign an authorization card for the Union would not have a job”. (R. 40; Tr. 53-56, *supra*, pp. 3-4.) On March 5, Williams again interrogated Sims about his suspected union sympathies. Sims then admitted that he “would vote for the Teamsters” (Tr. 58). As shown above (*supra*, p. 6), Williams threatened to discharge the employee because of this reason.

On the following day, March 6, Williams asked Sims to sign the company-prepared anti-union petition (*supra*, p. 7); Williams explained to the employee that “most \* \* \* of the other guys had signed already”, and Sims agreed to “go along with the majority” (R. 40; Tr. 63-66). Sims, however, later discovered that co-worker Reagan had not signed and he advised Pearce that he “wanted to erase [his] name \* \* \*” from the petition (Tr. 65-67). Pearce asked the employee why he had changed his mind, and Sims replied that he “wanted no part in keeping the Union out \* \* \*” (Tr. 65). Pearce informed the employee that the petition was at the Company’s Mendota yard and the employee could remove his signature there. Sims and Pearce then engaged in a heated exchange, and the employee, “upset” over the incident, challenged Pearce to a fight. Pearce, however, refused and told Sims to “take a couple of days off and cool off”. (Tr. 67.) Later that day, Sims returned to the Company’s yard and removed his signature (R. 40; Tr. 65-67, G.C. Exh. 2). There, Dispatcher Williams told the employee that he had been instructed by Pearce that

Sims "could be off a couple of days" (Tr. 67). Sims told Williams that he would call him on Tuesday night, March 8, to find out when he was to return to work (R. 40; Tr. 67-68).

On Tuesday, March 8, Sims called Williams at his home, and asked when and where he was to resume work. Williams told the employee: "We don't need you tomorrow. Just take another day off. Call tomorrow night." (R. 41; Tr. 68.) As instructed, Sims called Williams again on Wednesday evening, March 9. Williams then told the employee that he "wasn't \* \* \* sure whether they needed [him] the next day or not, and [Williams] would call him on \* \* \* Thursday morning \* \* \* or let [him] know" (R. 40; Tr. 69). Sims, having heard nothing from Williams during Thursday, March 10, went to Williams' home that evening with his wife (R. 41; Tr. 69-70). There, Sims asked Williams "if he was going to need [him] the next day" and Williams replied that "he didn't think so", "\* \* \* wait a few days and see what comes out"<sup>8</sup> (Tr. 70-71). Thereafter, Pearce sent Sims a letter, dated March 10 and postmarked March 13, which stated (R. 41; Tr. 71-74, G.C. Exhs. 5 and 6):

\* \* \*

On the 14th of Aug. 1965 you totally wreaked [sic] one of my trucks. The California Highway Patrol at the time could see no reason for the accident other than excessive speed. Approximately a month and a half later, I put you back to work on a trial basis, but quite frankly, I was elated on the afternoon of March the 6th, 1966, when you told me and my dispatcher that you were leaving our employ to go to another job because for what it is worth

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<sup>8</sup>Williams testified below that he had a conversation with Sims "a couple or three days \* \* \* after he took off"; that the employee asked him "when am I going to go back to work"; and that Williams replied: "\* \* \* as far as I know, you are not going back to work any time" (Tr. 345).

to you, I think you are going to have more accidents in the near future unless you start driving closer to the legal posted speed limits.

\* \* \*

Sims, as shown above, was not permitted to return to work after March 6.

## 2. *Carl Reagan*

Reagan worked for the Company from July to December 1963 and from July 1964 to March 10, 1966, when he was discharged (R. 45; Tr. 10-11). On January 31, he accompanied Sims and other employees to the Union's hall where he signed an authorization card (R. 43; Tr. 11-12). Reagan, like Sims (*supra*, pp. 8-9), was subsequently interrogated by Dispatcher Williams about signing a union card, and told to "get out and get another job" if he wanted union representation (R. 43; Tr. 14-16). Reagan then denied signing a union card (Tr. 15). Thereafter, on March 5, Reagan admitted to Williams that he had signed a card and Williams threatened him, as well as Sims, with discharge for this reason (*supra*, p. 9). Later that day, Reagan attended a meeting of drivers conducted by Pearce in an effort to discourage them from voting for the Union (*supra*, p. 6). During that meeting, Pearce, *inter alia*, made "offers to [the drivers] about selling [them] his tractors \* \* \* leasing his trailers to them", and he "could take care of the maintenance and repairs" (R. 43; Tr. 17-18). Reagan spoke up and told Pearce that his "tractor would need a major overhaul, that it would cost too much, that it was half worn out, [and that he] didn't want" it (Tr. 18). Pearce—admittedly "offended by this remark" (Tr. 278-279)<sup>9</sup>—referred profanely to a Teamsters official and exclaimed that "he did not want the Union" (R. 43; Tr. 17-18).

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<sup>9</sup>Pearce concededly regarded Reagan's "attitude" as "arrogant" (Tr. 279).

On the following day, March 6, Reagan adamantly refused to sign the company-prepared anti-union petition (R. 43; Tr. 20-23, *supra*, p. 7). Later that day, he had heard that his co-workers were told by management that "everybody signed it", and he asked Pearce to let him see it because he "wanted to make sure [his] signature wasn't on it" (R. 43; Tr. 23).

At the close of work on March 10, Williams informed Reagan that the truck assigned to him was to be sent to the shop for repair of oil leaks. Reagan asserted that the leaks were not serious, but Williams insisted on sending the truck in for repairs and instructed the driver to "take off [the next day] and call him." (R. 44; Tr. 25-26.) On March 11 and 12, when Reagan telephoned Williams to find out whether repair of his truck had been completed, Williams stated that the truck was "still \* \* \* at the yard" and had not yet been sent to the repair shop (R. 44; Tr. 26-27). On March 13, Reagan sought out Williams and asked him whether he was fired; Williams told the employee: "No sir, you are not fired. You still got your vote with the union when it comes up for election" (R. 44; Tr. 27-28). Reagan, however, observed another employee driving his truck and confronted Williams with this information. Williams then stated: "He didn't need any drivers right then \* \* \* [they] got all the drivers [they] needed." (R. 44; Tr. 28-29.)<sup>10</sup>

On the following day, March 14, Reagan received the following letter from Pearce (R. 45; Tr. 29-32, G.C. Exhs. 3 and 4):

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<sup>10</sup> Pearce testified below that on March 9 he instructed Williams to fire Reagan that evening but Williams "didn't tell him that he was fired" because, assertedly, "he was afraid that [Reagan] would beat him up" (R. 44, n. 12; Tr. 287-288). Pearce added that this "is the reason why Reagan was inconvenienced three or four days" (*ibid.*).

As you know, I have warned you no less than [sic] four or five times in the past six months about excessive speed, over and above the legal posted speed limits. To say nothing about what excessive speed costs in equipment wear and tear, the local police in the communities where we operate are concerned about your excessive speed. The California Highway Patrol are concerned about your excessive speed. My insurance company is more than [sic] concerned, it is on the verge of endorsing [sic] you off of my policy for excessive speed and they are on the verge of cancelling my whole policy over excessive speed. So for this reason, effective as of this date, I have no choice but to terminate your service with my company.<sup>11</sup>

Pearce, however, testified below (R. 45; Tr. 238-239):

\* \* \*

In fact, I think Mr. Reagan would still be working [for the Company] today if he hadn't taken the position immediately before he was fired that he was going to take over the Company and run the Company as he saw fit. That was his general attitude.

### *3. William Crider*

Crider worked for the Company during 1965, resigned, was later rehired and worked until April 27, 1966 (R. 48, 50, n. 32; Tr. 127-128, 156). He signed a union authorization card in early February, and was subsequently questioned about his union sentiments by Dispatcher Williams (R. 48; Tr. 130-133). Crider, in answer to Williams' interrogation, denied signing a union card (Tr. 131, 136).<sup>12</sup> He subsequently attended the March 5 anti-union meeting conducted by Pearce. Although Crider initially supported the unionization effort, he decided on March 5 to "go along

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<sup>11</sup>The above letter, like the one sent to driver Sims (*supra*, p. 10), was dated March 10, although not received by Reagan until March 14 (*ibid.*).

<sup>12</sup>As noted above (*supra*, p. 4, n. 5), Williams solicited Crider to report to him the names of those drivers who had signed union cards.

with" Pearce and give him an opportunity to make good on his promises of increased benefits and bonuses. (R. 48; Tr. 137-144, 153-154.) On March 6, he signed the Company's anti-union petition (*supra*, p. 7) and he subsequently attempted to persuade his co-workers to vote against the Union (R. 48; Tr. 144-146, 153-154).

During this latter period, Crider enjoyed a cordial relationship with Pearce (Tr. 154), and on the same day that driver Sims was laid off (*supra*, p. 9), Pearce assigned Crider to Sims' truck. Crider had previously driven a six-cylinder vehicle and Sims drove an eight-cylinder vehicle; Crider considered this assignment a "promotion" since the larger vehicle enabled him to make "more money". (R. 48; Tr. 148-151.) Pearce told the employee, "keep your nose clean" and the "truck is yours" (Tr. 151).

Shortly thereafter, Crider came upon information which led him to believe that Pearce would not keep his promises of March 5 and that, despite the fact the drivers were going to vote against the Union, "our trucks \* \* \* were being sold from under us" (R. 48; Tr. 154-156). Crider confronted Williams with this information; he told the dispatcher: "Even though we are not going to go Union, he's going to sell the trucks from under us" (Tr. 156). Williams replied, "I don't know, Jim \* \* \* I don't know" (Tr. 157). Crider then urged his co-workers to support the Union (R. 48; Tr. 157).

Pearce admittedly did not learn of Crider's pro-union efforts until sometime after the March 31 Board-election (R. 48; Tr. 244-245).<sup>13</sup>

<sup>13</sup> During the March 31 election, nine votes were cast for the Union and nine against it; there were also two challenged ballots including that of driver Reagan. The Regional Director on May 27 deferred ruling on his ballot pending the "outcome of this proceeding" (Tr. 274-275).

Thereafter, on April 15, Charles Chastian, underwriter for respondent's insurance carrier, sent Pearce a letter advising him to place drivers Crider, Sims and others on "probationary status" in order "to improve the accident record" of the Company (R. 48; Tr. 384-385, 388-407, G.C. Exhs. 9, 10, 11). Six days later, on April 21, Chastian wrote Pearce, advising him that drivers Reagan and Crider should be restricted from its insurance policy (Tr. 393-394, G.C. Exh. 9). Chastian explained that Crider and Reagan were restricted from the policy on April 21<sup>14</sup> because—between April 15 and 21—Chastian received a telephone call from James Mueller, the insurance company's field manager, advising him that "Pearce feels James Crider's and Carl Reagan's driving [is] not safe" (Tr. 388-407, G.C. Exhs. 9, 10, 11). Chastian decided "to request [a] restricted endorsement for James Crider and Carl Reagan on the basis of" this information (Tr. 402-403).<sup>15</sup>

Thereafter, on April 28, Crider's name was deleted from the list of employees scheduled to work that day. Crider "assumed" that this was because "the season was over";<sup>16</sup> however, he later heard a rumor that he had been fired (Tr. 159-160). He then called Dispatcher Williams and asked when he was "going back to work." Williams replied (Tr. 161):

Well, you are not. \* \* \* George [Pearce] has a letter from the insurance company saying to get rid of you \* \* \* for too many traffic violations.

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<sup>14</sup> As shown *supra*, p. 13, Reagan had been discharged earlier on March 10.

<sup>15</sup> On cross-examination of Chastian, Company counsel asked: "\* \* \* did Mr. Mueller ever tell you that Mr. Pearce had asked to have either James Crider or Carl Reagan restricted and endorsed off the policy?" The witness answered: "Well, that was the idea that came across to me from the telephone call—that Mr. Pearce was advising this for the policy" (Tr. 408).

<sup>16</sup> Driver Crider was hauling beets at the time. At the end of the season, there was a three to six week period when there were no beets to haul (Tr. 160).

Crider explained that he had only three traffic tickets, whereupon Williams replied, "George got the letter. You have got to go to Sacramento and get it straightened out \* \* \* and see George about getting your job back" (R. 49; Tr. 161). Crider thereafter wrote Pearce but received no reply (R. 49; Tr. 161). Pearce acknowledged before the Examiner that he considered Crider "good enough to keep" and "good enough to take back if the insurance company will take him back" (R. 49; Tr. 298-299).

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that the Company had violated Section 8(a)(1) of the Act by interrogating employees about their union interests, promising employees higher wages and other economic benefits in order to induce them to reject unionization, threatening to sell its trucks and use sub-haulers if unionization occurred, and preparing and circulating an anti-union petition. The Board further concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Sims, Reagan and Crider because of their union activities.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Company is required to offer reinstatement to employees Sims, Reagan and Crider, to make them whole for any loss of pay they may have suffered by reason of the Company's discrimination against them, and to post appropriate notices (R. 50-52, 72-73).

## ARGUMENT

## I.

**SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY THREATENED, COERCED AND RESTRAINED ITS EMPLOYEES, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT**

The evidence summarized in the Statement, *supra*, pp. 3-16, clearly shows that the Company's attitude toward its employees' exercise of their organizational rights was one of adamant hostility. From the beginning of the Union's organizational campaign in late January until the March 31 election, Company Dispatcher Williams repeatedly admonished employees that if they wanted union representation, they should "get out and get a union job", that any driver who signed a union authorization card "would not have a job", and that "if you want a union, you don't stay around here" (*supra*, pp. 3-5). Indeed, when employees Sims and Reagan admitted their pro-union sentiments to Dispatcher Williams, he threatened to fire them for this reason (*supra*, p. 6). Owner Pearce similarly instructed employees: "If you want the Union, go hunt yourself a job, and if you don't go on and work here" (*supra*, p. 8). Pearce also threatened employees that "if the Union did come in he'd sell his trucks \* \* \* and get subhaulers to pull his trailers" (*supra*, p. 5). Such open threats are clearly violative of Section 8(a)(1) of the Act. See, e.g., *N.L.R.B. v. Geigy Company*, 211 F.2d 553, 557 (C.A. 9), cert. denied, 348 U.S. 821; *N.L.R.B. v. Idaho Egg Producers, Inc.*, 229 F.2d 821, 823 (C.A. 9); *N.L.R.B. v. West Coast Casket Co.*, 205 F.2d 902, 904-05 (C.A. 9); *N.L.R.B. v. V. C. Britton Co.*, 352 F.2d 797, 798 (C.A. 9); *N.L.R.B. v. Ambrose Distributing Co.*, 358 F.2d 319, 320 (C.A. 9), cert. denied, 385 U.S. 838.

At the same time, Dispatcher Williams repeatedly quizzed employees whether they and their co-workers had signed union cards or were engaging in union solicitation (*supra*, pp. 3-5). Having been threatened by Williams with discharge if they supported the Union, the employees understandably denied engaging in such activities. Williams, however, persisted in his effort to find out which drivers favored the Union.<sup>17</sup> Thereafter, when Williams discovered that certain employees had "lied to him about the Union", he pointedly confronted them with this information and again interrogated them (*supra*, p. 4). As shown above (*supra*, pp. 5-6), employees Sims and Reagan finally confessed to Williams their union support, and were then instructed "to park their trucks" because "if you want a union you don't stay around here." Such interrogations, under settled principles, violate Section 8(a)(1) of the Act because they have a "natural tendency to instill in the minds of employees fear of discrimination on the basis of the information [sought]". *N.L.R.B. v. West Coast Casket Co.*, *supra*, 205 F.2d at 904; see also, *N.L.R.B. v. Idaho Egg Producers, Inc.*, *supra*, 229 F.2d at 822-823; *Daniel Construction Co. v. N.L.R.B.*, 341 F.2d 805, 812 (C.A. 4), cert. denied, 382 U.S. 831; *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F.2d 417, 420 (C.A. 5).

Pearce, in a further effort to defeat the unionization of his drivers, repeatedly offered the employees higher wages, a sizeable Christmas bonus, and paid hospitalization benefits if they abandoned or, at least, postponed for one year their right to vote for union representation (*supra*, pp. 4-7). At the same time, Pearce and Williams threatened employees with discharge, sale of the Company's trucks, and other dire consequences if they rejected

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<sup>17</sup>As driver Crider related (*supra*, p. 4 n. 5), Williams asked him if he "knew who had signed union cards" and solicited the employee "to find out" and report the signers to him.

management's proposals (*supra*, pp. 3-8). "[A]llurements to force abandonment of the Union" are clearly violative of the employees' Section 7 rights. *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829 (and cases cited therein); *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 845 (C.A. 9).

Finally, Pearce--after having offered his employees various economic benefits in lieu of union representation--attempted to consummate the deal by preparing and circulating for their signature a petition which stated that they "do not want the Teamsters Union or any other Union \* \* \* to represent [them] in any way whatsoever" (*supra*, pp. 7-8). Indeed, in an effort to prevent the employees from even having the right to confirm or deny their asserted disclaimer of all union representation at a Board-conducted election, Pearce added to his anti-union petition the language: "Nor do I want to vote on this matter again before March 15, 1967, and only then if I so request it" (*supra*, p. 7). The employees were thus required to commit themselves, under the close observation of Company representatives, to a choice between unionization and no unionization. Such employer sponsored petitions--accompanied by threats and other coercive conduct--are patently designed to pressure rank-and-file workers into exposing and renouncing their union interests prior to an election, and, therefore, have been consistently held to have a tendency to interfere with the employees' Section 7 right to choose freely in a Board election whether or not they want union representation. See, e.g., *N.L.R.B. v. V. C. Britton Co.*, 352 F.2d 797 (C.A. 9); *N.L.R.B. v. California Compress Co.*, 274 F.2d 104, 106 (C.A. 9); *N.L.R.B. v. S. & H. Grossinger's, Inc.*, 372 F.2d 26, 29 (C.A. 2); *N.L.R.B. v. Movie Star, Inc.*, 361 F.2d 346, 348-349 (C.A. 5); *Edward Fields, Inc. v. N.L.R.B.*, 325 F.2d 754, 760 (C.A. 2).

In sum, substantial evidence on this record supports the Board's finding that the Company threatened, coerced and restrained its employees, in violation of Section 8(a)(1) of the Act.<sup>18</sup>

## II.

**SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DISCHARGED EMPLOYEES SIMS, REAGAN AND CRIDER BECAUSE OF THEIR PRO-UNION ACTIVITIES, IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT**

The Company, as shown above, was strongly opposed to the unionization of its employees and took immediate steps to forestall and frustrate their organizing effort. The discharge and layoff of known union protagonists is a classic method of undermining an organization effort. The credited evidence, summarized *supra*, pp. 8-16, demonstrates that the employer's treatment of employees Sims, Reagan and Crider was of such a nature.

### A. Floyd Sims

Sims was hired by the Company in 1959. In late January 1966, he signed a union authorization card and was instrumental in getting his co-workers to sign similar cards. On February 1 or 2, Dispatcher Williams telephoned his sister, Sims' wife, to find out whether the employee was circulating union cards among the drivers. Thereafter, Williams questioned

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<sup>18</sup> Before the Board, respondent attacked the various credibility resolutions made by the Trial Examiner. The Examiner, however, has carefully indicated in his decision the reasons for his crediting certain witnesses and not others (R. 38-40). The Board, after reviewing the record, adopted these findings (R. 72). It is settled that such credibility determinations are peculiarly within the province of the Board and the Trial Examiner, and should rarely be disturbed on review. See, e.g., *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408; *N.L.R.B. v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659-660; *N.L.R.B. v. Local 776, IATSE*, 303 F.2d 513, 518 (C.A. 9), cert. denied, 371 U.S. 826; *N.L.R.B. v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377, 381 (C.A. 9).

the employee about his suspected union activities. Sims denied engaging in the organizational effort, and Williams admonished the employee that the Company “was going to stay non-union” and drivers who supported the Union “would not have a job” (*supra*, pp. 8-9).

On March 5, Williams again interrogated Sims about his suspected pro-union efforts. This time Sims admitted that he “would vote for the Teamsters”, and Williams then threatened to discharge the employee for this reason. On the following day, March 6, Sims—after having signed the company-prepared anti-union petition—changed his mind and told Pearce that he “wanted to erase [his] name” because he “wanted no part in keeping the Union out” (*supra*, p. 9). Pearce and Sims then engaged in a heated exchange and the employee was told to “take a few days off to cool off” (*supra*, p. 9).<sup>19</sup>

On March 8, Sims called Williams and asked when he could return to work; Williams told the employee to “take another day off” and “call tomorrow.” On March 9, Sims again called Williams; Williams told the employee that he “wasn’t \* \* \* sure whether they needed” him and “would call him” the next day. On Thursday March 10, Sims, accompanied by his wife, went to Williams’ home and again asked to return to work. Williams admittedly told the employee (Tr. 344-345): “\* \* \* you are not going back to work any time.” Finally, on March 14, Sims received a letter from Pearce, dated March 10 and postmarked March 13, informing the employee that he had damaged a company truck approximately seven months earlier,

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<sup>19</sup> Although Sims then challenged Pearce to a fight, the Company does not contend that he was discharged for this reason. As Company counsel stated before the Trial Examiner (Tr. 209): “We have no contention that Sims was discharged for any reason.”

that he had been put back to work on a "trial basis" some five months earlier, and that Pearce "was elated on the afternoon of March the 6th 1966" when Sims allegedly "told [Pearce] and [his] dispatcher" that he was "leaving \* \* \* to go to another job \* \* \*." (*supra*, pp. 10-11.)

The Board rejected the Company's assertion that Sims had quit on March 6 to take another job, and instead found that Sims' March 6 layoff was converted into a discharge on March 8 because of the employee's known union support. As the Examiner found (R. 42): "\* \* \* I do not credit the testimony of Pearce and Williams that Sims told them on March 4 and 6 that he had another job and was quitting. There is nothing in the record to show that he received any job offers on or before March 6. \* \* \* If Sims had quit for another job, it is unlikely that he would have sought for three days to return to work \* \* \* [or that] Williams would have made no reference to a resignation \* \* \* and would finally have stated that Sims would not be returned to work \* \* \*", as Williams admitted. Moreover, as the Examiner further found (R. 43): "This view is buttressed by the very fact that the [March 10] letter was sent, since it was an unnecessary, and indeed somewhat unusual communication, to an employee who had quit." Under the circumstances, the Examiner's credibility resolutions, adopted by the Board, are entitled to affirmance since there has been no showing made here that management's discredited denials could not in reason be disbelieved or that the credited testimony is inherently improbable. See, *N.L.R.B. v. Warrensburg Board & Paper Corp.*, 340 F.2d 920, 922 (C.A. 2); *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 469-470 (C.A. 9); and cases cited *supra*, p. 20, n. 18.

In sum, management's anti-union animus, its unlawful interrogation of Sims accompanied by repeated threats to discharge him for engaging in pro-union activities, the employee's subsequent refusal to sign the anti-union petition, and the obviously pretextual reason given for his termination, all furnish ample support for the Board's finding that Sims was discriminatorily discharged, in violation of Section 8(a)(3) and (1) of the Act. See, e.g., *Aeronca Mfg. Co. v. N.L.R.B.*, 385 F.2d 724 (C.A. 9); *N.L.R.B. v. Harrah's Club*, 362 F.2d 425, 428-430 (C.A. 9), cert. denied, 386 U.S. 915; *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9); *N.L.R.B. v. Victory Plating Works, Inc.*, 325 F.2d 92, 93 (C.A. 9); *N.L.R.B. v. Idaho Potato Processors, Inc.*, 322 F.2d 573, 575 (C.A. 9); *N.L.R.B. v. West Coast Casket Co., Inc.*, 205 F.2d 902, 907 (C.A. 9).

### B. Carl Reagan

The Board also found that driver Reagan was discharged on March 10 because of his union partisanship. The credited evidence, summarized above, amply supports this finding. Reagan worked for the Company from July to December 1963 and from July 1964 to March 10, 1966. Reagan, like Sims, signed a union authorization card during late January, was subsequently interrogated by Dispatcher Williams about his suspected union sympathies, and told to "get out and get another job" if he wanted union representation. Reagan at first denied signing a card. However, on March 5, the employee finally admitted to Williams that he had signed a card and was promptly threatened with discharge for this reason. Later that same day, Reagan spoke up at Pearce's anti-union meeting, indicating his opposition to management's proposals in lieu of unionization. Pearce was admittedly offended at the employee's rejection of his proposition. On the following day, March 6, Reagan refused to sign the Company's anti-union

petition and—after having heard that his co-workers were told by management that “everybody signed it”—asked Pearce to let him see the petition “to make sure [his] signature wasn’t on it.” (*Supra*, pp. 11-12.)

Four days later, on March 10, Williams told the employee that his truck was in need of repairs and instructed the driver to take off the next day. Reagan protested that his truck did not need repair. Thereafter, on March 11 and 12, when Reagan inquired of Williams whether the vehicle had been repaired, he was told that the truck was “still \* \* \* at the yard.” Reagan, on March 13, asked Williams whether he was fired; the dispatcher assured the employee: “\* \* \* you are not fired. You still get your vote with the Union when it comes up for election.” Reagan, however, then observed another employee driving his vehicle and confronted Williams with this information. Williams then stated that he “didn’t need any drivers right then \* \* \* [they] got all the drivers [they] needed.” Finally, on March 14, Reagan received a letter from Pearce, dated March 10, advising him that “effective as of this date” he was terminated because of driving at “excessive speed”, and the Company’s insurance carrier “is on the verge of endorsing [sic] you off my policy for excessive speed.” (*Supra*, pp. 12-13.)

At the hearing below, Pearce retracted the reason for discharge emphasized in his March 10 letter to the employee—i.e., that the insurance company was “on the verge of [endorsing Reagan] off [the] policy for excessive speed” (R. 45; Tr. 290-291).<sup>20</sup> Indeed, as shown above (*supra*,

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<sup>20</sup> Pearce admittedly signed the insurance company’s endorsement excluding Pearce from its policy in late April, long after the employee had been terminated (Tr. 290-291, Resp. Exhs. 3 and 4). He testified that the “exclusion didn’t have any bearing on me firing him, because he was fired a month before \* \* \* or thereabouts”

p. 15), the insurance company's underwriter would not have excluded Reagan from its policy but for Pearce's advice to his agent (R. 46). Pearce again shifted his asserted reason for discharging Reagan, stating that "Reagan was discharged because of his rank insubordination \* \* \* and particularly because of his traffic violations \* \* \*" (R. 47; G.C. Exh. 1(g), p. 3). As for the "traffic violations", Reagan had not received a traffic ticket after October or November 1965 (R. 47; Tr. 34), and Pearce permitted Reagan to continue working after the season resumed in early 1966. And as for the employee's "rank insubordination," Pearce acknowledged below that Reagan was considered "arrogant" because he refused to go along with Pearce's March 5 proposal to sell the employees their trucks as an alternative to unionization (R. 45; Tr. 238-239, 278-279).

In view of the Company's anti-union animus, its coercive interrogations of and threats to Reagan and other employees, Reagan's refusal to sign the company-prepared petition or go along with Pearce in keeping the Union out, and the pretextual and shifting reasons asserted for discharging the employee, the Board reasonably found that Reagan was also discharged because of his union interests. See cases cited *supra*, p. 23.

### C. William Crider

Crider worked for the Company during 1965, resigned, was later rehired, and worked until April 27, 1966 (*supra*, pp. 13-16). Although Crider signed a union authorization card during early February, Pearce

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(Tr. 291). Pearce also acknowledged that he did not receive any communication from the insurance company placing Reagan on probationary status before he fired him (R. 45-45; Tr. 290, 293, *supra*, p. 15). In fact, as the Company's insurance underwriter testified (Tr. 403-404), he looked into Reagan's driving record on April 15 and then decided not to place Reagan on probationary status.

admittedly (Tr. 244) did not become aware of the employee's pro-union efforts until after the March 31 Board-conducted election.<sup>21</sup> Thus, prior to this time, Crider had denied to Williams that he had signed a union card, signed the Company's anti-union petition, and made known to his co-workers his view that Pearce should be given an opportunity to make good on his March 5 promises of increased benefits if the employees rejected the Union (*supra*, p. 14). During this period, Crider enjoyed a cordial relationship with Pearce, received a "promotion" despite prior traffic citations, and was told by Pearce that he had "done a good job" (R. 48-49; Tr. 148-151).

Crider, however, subsequently came upon information which caused him to believe that Pearce planned to renege on his March 5 promises. As the employee stated to Dispatcher Williams: "Even though we are not going to go Union, he's going to sell the trucks from under us" (*supra*, p. 14). Williams answered: "I don't know, Jim \* \* \* I don't know" (*ibid.*). Crider thereafter campaigned for the Union.

On April 28, Crider's name was deleted from the list of employees scheduled to work that day. The employee at first thought that this was because the season had ended; he later heard a rumor that he had been fired. Crider then called Williams and was advised that Pearce "has a letter from the insurance company saying to get rid of you \* \* \* for too many traffic violations" (*supra*, p. 15). Crider explained that he had only three violations, whereupon Williams instructed the employee to "see George [Pearce] about getting your job back" (*supra*, p. 16). Crider thereafter wrote Pearce but received no reply.

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<sup>21</sup>As shown (*supra*, p. 14), on March 31 nine votes were cast for the Union, nine against it, and two ballots were challenged.

Before the Board, Pearce testified that he "discharged Mr. Crider when [he] got the notice that he was excluded from the insurance policy" (Tr. 245). Pearce further testified that he "considered [Crider] good enough to keep" and "good enough to take back if the insurance company will take him back" (Tr. 298-299). However, as shown above (*supra*, p. 15), Crider—like Reagan—was excluded from the insurance policy at Pearce's behest. Indeed, Pearce shifted from this asserted reason for discharge to the employee's "general attitude when he was testifying" before the Examiner. As Pearce stated (Tr. 299-300)

\* \* \* I feel with the attitude that he seemed to have here yesterday, that he might not drive the way he should. \* \* \* Just his general attitude when he was testifying.

Pearce, although characterizing the employee's testimony as "lies", was nevertheless "willing to reemploy him" "If that is what it takes to satisfy him and you people \* \* \*" (Tr. 300).

Under the circumstances, the Board reasonably found that Crider, like Sims and Reagan, was discriminatorily discharged (see cases cited *supra*, p. 23).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

ARNOLD ORDMAN,  
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July 1968

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

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### RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

### UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; \* \* \*

\* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \* \* \*

### PREVENTION OF UNFAIR LABOR PRACTICES

[Sec. 10](e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the

court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

No. 22779

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

STATE OF ARIZONA,  
ex rel. EDGAR MERRILL,  
Sheriff of Apache County,

Appellant,

vs.

WAYNE TURTLE,

Appellee.

Appeal from the  
United States  
District Court for  
the District of  
Arizona

**BRIEF OF APPELLEE**

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**FILED**

AUG 6 1968

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## TABLE OF AUTHORITIES

## CASES:

	Page
<i>Cherokee Nation v. Georgia</i> , 5 Pet. 1, 8 L.Ed. 25 (1831)....	4
<i>Colliflower v. Garland</i> , 342, F.2d 369 (9th Cir. 1965).....	8
<i>Ex Parte Crow Dog</i> , 109 U.S. 556, 27 L.Ed. 1030 (1883)....	4
<i>Ex Parte Morgan</i> , 20 F. 299 (W. D. Ark. 1883).....	11
<i>Hyatt v. New York</i> , 188 U.S. 691, 47 L.Ed. 657 (1930)....	11
<i>Iron Crow v. Oglala Sioux Tribe</i> , 231 F.2d 89 (8th Cir. 1956).....	5
<i>Kentucky v. Dennison</i> , 24 How. 66, 107, 16 L.Ed. 717, 729 (1861).....	8
<i>Littell v. Nakai</i> , 344 F.2d 486 (9th Cir. 1965), cert. denied, 382 U.S. 986, 15 L.Ed.2d 474 (1965).....	4
<i>Maryland Casualty Co. v. Citizens National Bank</i> , 361 F.2d 517 (5th Cir. 1966) .....	5
<i>Metlakatla Indian Community v. Egan</i> , 369 U.S. 45, L.Ed.2d 562 (1962) .....	5
<i>Native American Church v. Navajo Tribal Council</i> , 272 F.2d 131 (10th Cir. 1959) .....	5
<i>Oklahoma Tax Commission v. United States</i> , 319 U.S. 598, 87 L.Ed. 1612 (1943) .....	5
<i>Oliver v. Udal</i> , 306 F.2d 819 (D. C. Cir. 1962), cert. denied 372 U.S. 908, 9 L.Ed.2d 717 (1963) .....	5
<i>Organized Village of Kake v. Egan</i> , 369 U.S. 60, 75, 7 L.Ed.2d 573, 584 (1962) .....	5

## TABLE OF AUTHORITIES (Cont'd)

### CASES:

	Page
<i>United States v. Forness</i> , 125 F.2d 928 (2d Cir. 1942) cert. denied sub. nom. <i>City of Salamanca v. United States</i> , 316 U.S. 694, 86 L.Ed. 1764 (1942) .....	5
<i>United States v. Kagama</i> , 118 U.S. 375, 30 L.Ed. 228 (1886) .....	4
<i>United States v. United States Fidelity &amp; Guaranty Co.</i> , 309 U.S. 506, 84 L.Ed. 894 (1940) .....	4
<i>Williams v. Lee</i> , 358 U.S. 217, 3 L.Ed.2d 251 (1959) .....	4
<i>Worcester v. Georgia</i> , 6 Pet. 515, 8 L.Ed. 483 (1832) .....	4

### CONSTITUTIONAL PROVISIONS

Constitution of the United States Article IV, Section 2.....	7
---	---

### STATUTES

#### Arizona Revised Statutes

Title 5, Section 13-1313 (1956) .....	3
Title 5, Section 13-1315 (1956) .....	3

#### Navajo Tribal Code

Title 7, Section 63 (1962) .....	11
Title 17, Section 1841 (1962) .....	9
Title 17, Section 1842 (1962) .....	9

## TABLE OF AUTHORITIES (Cont'd)

	Page
<b>STATUTES</b>	
<b>Public Laws</b>	
Civil Rights Act of 1968, Pub. L. No. 90-284, Section 401(a) (11 April 1968), U.S. Code Cong. & Admin. News, 5 May 1968, p. 710 .....	6
Pub. L. No. 280, Chap. 505, 67 Stat. 590 (1953).....	6
Treaty of 1868, 15 Stat. 667 (12 Aug. 1868).....	4
<b>United States Code</b>	
Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C., Section 636 (1964) .....	6
Title 18, Section 1152 (1964) .....	10
Title 18, Section 1153 (1964) .....	10
Title 25, Section 223 (1964) .....	6
Title 25, Section 231 (1964) .....	5
<b>OTHER AUTHORITIES</b>	
31 Am. Jur. 2d, <i>Extradition</i> , Section 47 (1967).....	8
S. Steiner, THE NEW INDIANS (1968) .....	13
U. S. Department of Interior, FEDERAL INDIAN LAW (1958) .....	4
Telephone Interview with U. S. Census Office, Window Rock, Arizona .....	13



**No. 22779**

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Appellant,

vs.

WAYNE TURTLE,

Appellee.

Appeal from the  
United States  
District Court for  
the District of  
Arizona

**BRIEF OF APPELLEE**

**QUESTIONS PRESENTED**

- I. Whether the Governor of Arizona may interfere with the right of the Navajo Indians to exercise powers essential to tribal self-government by removing an Indian from the Reservation for purposes of extradition to another state.
- II. Whether the Governor of Arizona may apply the state extradition process to a non-Navajo Indian residing on the Navajo Reservation without interfering with powers essential to tribal self-government, where the Tribe has

exercised powers of extradition over all Indians on the Reservation.

### STATEMENT OF FACTS

The Appellee, a Cheyenne Indian who resides with his Navajo Indian wife on the Navajo Indian Reservation, is sought by the State of Oklahoma for trial on a charge of second degree forgery (R.I:9, I:23). After the Navajo Tribal government declined to extradite the Appellee to Oklahoma (R.I:4, I:7, I:13-15), demand was made upon the Governor of Arizona to secure the Appellee and the Governor issued his warrant of extradition (R.I:8-10). The Sheriff of Apache County thereupon arrested the Appellee on the Navajo Indian Reservation and confined him in the Navajo jail facility at Window Rock, Arizona, to await removal to Oklahoma (R.I:22, I:1-2). Before Oklahoma authorities arrived to transport him, Appellee sought a writ of habeas corpus on the ground that the State of Arizona had no jurisdiction to arrest and extradite him from the Navajo Indian Reservation (R.I:1-18). The district court, after hearing, ordered the issuance of the writ. (R.I:44).

On January 5, 1968, the Appellee was the subject of extradition proceedings on the same Oklahoma charge, under the law of the Navajo Tribe (R.I:7), which provides for a hearing before a Tribal judge upon demand to determine whether there is probable cause to believe the Appellee committed the alleged offense and whether he would receive a fair trial in the demanding State as prerequisites to rendition (R.I:15). The Tribal Court assumed jurisdiction of the Appellee, but after hearing before the Tribal Court, the Appellee was released on the ground that the Navajo Tribal law provided for extradition to three named states, Arizona, New Mexico or Utah and not to Oklahoma (R.I:7, I:5, I:49).

Upon being released by the Tribal Court Judge, the Appellee was arrested by an Arizona highway patrolman under the same

Oklahoma warrant and complaint and taken before the Arizona Justice of the Peace at Window Rock, Arizona. After hearing pursuant to the Arizona Uniform Criminal Extradition Act (A.R.S. §§ 13-1313, 13-1315), he was held to await issuance of the Governor's Extradition Warrant.

Apparently the Appellee was released on bail or recognizance by the Justice Court because sometime thereafter the Apache County Sheriff, or his agents, executed the Arizona Governor's February 6, 1968 extradition warrant by arresting the Appellee on the Navajo Indian Reservation at Window Rock and confining him in the Tribal jail facility at Window Rock (R.I:23-33). On February 16th, the Appellee was taken from the Tribal jail facility in Window Rock to the County jail at St. Johns, Arizona (R.I:23-33). On the 26th of February, the Apache County Sheriff returned him to the Reservation (R.I:34 and II:2-4) where he remained in the Sheriff's custody at Tribal jail facility during the proceedings below and until his release on the writ (R.II:2-3).

The district court entered no findings or opinion, but after extensive argument on the law, ordered the issuance of the writ of habeas corpus because he was ". . . satisfied that under the particular circumstances of this case, that the state authorities exceeded their jurisdiction in arresting the Petitioner [Appellee] on the Navajo Reservation." (R.II:28-29).

## ARGUMENT ONE

### THE GOVERNOR OF ARIZONA HAS NO AUTHORITY TO EXTRADITE THE APPELLEE FROM THE NAVAJO INDIAN RESERVATION BECAUSE:

- A. *Under The Rule In Williams v. Lee The State Of Arizona Cannot Exercise Powers On The Navajo Reservation Which Are Essential To Tribal Self-Government.*

The United States Government recognized the right of the Navajo people to govern the affairs of Indians on the Navajo

Reservation in the Treaty of 1868, 15 Stat. 667 (12 Aug. 1868). The Supreme Court has, in a long line of cases beginning with *Cherokee Nation v. Georgia*, 5 Pet 1, 8 L. Ed. 25 (1831), consistently upheld the general principle that Indian tribes retain exclusive governmental power over the affairs of reservation Indians to the extent that Congress, in its plenary power over Indian affairs, has not acted explicitly to divest them of their sovereignty. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L. Ed. 894 (1940); *United States v. Kaganma*, 118 U.S. 375, 30 L. Ed. 228 (1886); *Ex Parte Crow Dog*, 109 U.S. 556, 27 L. Ed. 1030 (1883); *See Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483, (1832). And see U.S. Department of Interior, FEDERAL INDIAN LAW, 398, 402 (1958). The principle of reservation self-government was reiterated in the landmark case of *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251 (1959). In *Williams* the Court held that the State of Arizona had no jurisdiction over a seller's action for the price arising out of a transaction between a white trader and an Indian on the Navajo Reservation because the exercise of such state jurisdiction, ". . . would undermine the authority of the Tribal Court over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223, 3 L. Ed. 2d at 255. In *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965), cert. denied, 382 U.S. 986, 15 L. Ed. 2d 474 (1965), this court applied the *Williams* test to sustain the lower court's dismissal of a suit to enjoin tortious interference with a contractual relationship between a lawyer and the Navajo Tribe for want of jurisdiction, holding, *inter alia*, that the exercise of diversity jurisdiction over the contractual relationship would interfere with reservation self-government. The *Williams* test is thus the modern formulation of the concept of treaty-protected retained sovereignty over reservation affairs. As the Court said in *Williams*, regarding the scope of Arizona's jurisdiction generally over the Navajo Reservation:

Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right

of reservation Indians to make their own laws and be ruled by them. 358 U.S. at 220, 3 L. Ed. 2d at 254.

In those cases where the Supreme Court has upheld the jurisdiction of the state over Indians, the court has always taken care to distinguish the particular fact situation from that of treaty-protected reservation self-government. See, e.g., *Organized Village of Kake v. Egan*, 369 U.S. 60, 7 L. Ed. 2d 573 (1962) and *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 87 L. Ed. 1612 (1943), and compare, *Metakanla Indian Community v. Egan*, 369 U.S. 45, 7 L. Ed. 2d 562 (1962). The principle of retained tribal sovereignty has been held controlling in a variety of circumstances by those other federal circuits which have recently faced the problem of delineating exclusive tribal power, on the one hand, and federal or state power on the other. e.g., *Oliver v. Udall*, 306 F.2d 819 (D.S. Cir. 1962), cert. denied, 372 U.S. 908, 9 L. Ed. 2d 717 (1963) (Secretary of Interior's approval of tribal peyote law not violative of First Amendment because Tribal Council regulation of use of peyote in religious practices is exercise of self-government); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (Tribal sovereignty is not limited by First Amendment restrictions absent Congressional action explicitly extending the limitations to tribal governmental action); *Iron Crow v. Ogala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (upholding tribal criminal jurisdiction and power to tax as incidents of residual sovereignty). See also *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966); *United States v. Forness*, 125 F.2d 928 (2nd Cir. 1942), cert. denied sub nom., *City of Salamanca v. United States* 316 U.S. 694, 86 L. Ed. 1764 (1942).

Congress has, in the exercise of its plenary powers over Indian affairs, authorized the states, to exercise limited functions on Indian Reservations, e.g., 25 U.S.C. § 231 (authorizing state enforcement on reservations of state health and compulsory school attendance laws; the latter only with organized tribal government

consent); 25 U.S.C. § 223 (authorizing exercise by New York State of jurisdiction over civil action involving Indians), but explicit congressional action is required to divest the tribe of an essential feature of its exclusive control over internal affairs in favor of the state. *Williams v. Lee*, 358 U.S. at 220, 3 L. Ed. 2d at 254; *Iron Crow v. Ogala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956). And Congress, in its most recent expression of policy on tribal-state relations, has emphasized the fundamental importance of maintaining tribal autonomy in the face of increasing state pressure to exercise control over internal reservation affairs by amending Public Law 280, Chapter 505 § 6, 67 Stat. 590 (1953), to require tribal consent to state assumption of criminal or civil jurisdiction over Indian Reservations. Civil Rights Act of 1968, Pub. L. 90-284 § 402 (a), (11 April 1968). This federal enactment, including the Indian Bill of Rights, is a continuation of the well-established federal policy of developing and strengthening the Navajo Tribal Government and its courts. See, The Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 46, 25 U.S.C. § 636 (1964), and the discussion in *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251.

Since *Williams*, the Secretary of Interior has approved the adoption by the Navajo Tribal Council of the Law and Order Code formulated by the Department of Interior. In *Oliver v. Udall*, 306 F.2d 819 (D. C. Cir. 1962), the court upheld the Secretary's action in approving the Tribal Council's action, stating:

It is our view that the Secretary's approval of the tribal action in 1959 was entirely in keeping with that abstinence from federal intervention in the internal affairs of an Indian Tribe which the law clearly requires. The Secretary had simply recognized the valid governing authority of the Tribal Council. 306 F.2d at 823.

Thus, the federal courts, Congress and the Department of Interior have consistently recognized the right of the Navajo Tribal Government, its legislature and courts, to exercise ex-

clusive authority to adopt and enforce laws relating to internal reservation affairs and conduct. As this court said in *Littell v. Nakai*:

In sum then, a strong congressional policy to vest the Navajo Tribal government with responsibility for their own affairs emerges from the decision in Williams. Plainly, fruition of the policy depends upon freedom from outside interference. 344 F.2d at 489.

Appellee has been unable to discover any explicit Congressional action limiting the exclusive power of the Navajo Tribal Government to extradite Indians found on the Reservation, nor has he been able to find any Congressional action granting the State of Arizona power to enter the Navajo Reservation and remove an Indian suspect on its own authority.

The question presented by the instant case, then, is whether the State of Arizona's exercise of extradition jurisdiction over the Appellee constitutes such interference as to undermine the authority of the Navajo Tribal Government over Reservation affairs and hence infringes the exclusive right of the Indians to govern themselves. *Williams v. Lee*, 358 U.S. 217, 3 L. Ed. 2d 251, *Littell v. Nakai*, 344 F.2d 486. The Appellant has argued that the United States Constitution Art. IV § 2 is dispositive of this case because it imposes a duty upon the governors of the various states to render up those who have fled from justice in sister states. Although this constitutional mandate is clear, it is equally clear that the imposition of this duty does not empower the Governor of the State of Arizona to go beyond the limits of his authority to take an individual to render him up to the authorities of the demanding state.

The Arizona Governor's duty to extradite can only be coextensive with his authority to do so. The application of the rule in *Williams v. Lee* to this case simply relieves the Governor of any duty to extradite Indians from the Navajo Reservation and places it exclusively within the Tribe's responsibility for self-gov-

ernment, because the scope of state power with respect to Indian Reservations is dependent in the first instance on the scope of retained tribal sovereignty over Indian affairs on the Reservation. *Williams v. Lee, supra; Littrell v. Nakai, supra.*

In *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), this court held that a federal court had jurisdiction to issue a writ of habeas corpus to test the legality of the detention of an Indian pursuant to a tribal court order which violated potentially applicable provisions of the Bill of Rights. The court carefully distinguished the question there involved from the question of jurisdiction as between state and tribal courts, 342 F.2d at 376, 378, and expressly refused to rule on the relationship between tribal sovereignty and specific constitutional duties, 342 F.2d at 379. Further, the provisions of the Bill of Rights are restrictions on the acts of political entities in favor of individual rights; the extradition provision, on the other hand, operates to impose a duty on executives of distinct political entities assumed to possess the requisite authority to act. Therefore this court, in the instant case, must apply the principles of *Williams* and *Littell* to determine the proper allocation of authority between the Governor of Arizona and the Navajo Tribe with respect to extradition of Indians from the Reservation.

#### B. *The Power To Extradite Indians Found Within The Navajo Reservation Is Essential To Navajo Tribal Self-Government.*

The power to extradite a person to another jurisdiction for trial according to its criminal laws is clearly essential to any regime of self-government; indeed, it is established law that, in the context of interstate extradition, there is no power that can compel a state to perform its constitutional duty of extradition. *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717 (1861); 31 Am. Jur. 2d. *Extradition* § 47 (1967). The intimate relationship between exclusive extradition power and retained Navajo sovereignty over the reservation was recognized from the outset by the United

States Government in the Treaty of 1868, 15 Stat. 667 (12 August 1968). Article I of the Treaty provides in relevant part:

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo Tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. . . .

These provisions govern extradition of Indians from the Reservations; they or similar provisions are found in most treaties negotiated with the Indian Tribes. See *Ex Parte Crow Dog*, 109 U.S. 556, 569, 27 L. Ed. 1030, 1035 (1883). By their terms they recognize an exclusive jurisdiction in the Navajo Tribe to extradite Indians; thus a damage remedy is created as compensation for wrongful refusal to extradite. The Treaty, by explicitly including within tribal self-government the power of extradition, recognized the reality of tribal government needs in the context of white-Indian relations; a tribal government which lacked the power to determine when and under what conditions Indians would be rendered up to a foreign jurisdiction for trial would have little respect in the eyes of its Indian constituency.

The federal policy embodied in these Treaty provisions has continued through to the present. On January 27, 1956, the Navajo Tribal Council, the democratically elected Navajo legislature, passed a Resolution establishing procedures for Indian extradition. These procedures were approved by the Commissioner of Indian Affairs on January 31, 1956, and are set forth in 17 N.T.C. §§ 1841-42 (App. II). This extradition law, while it differs from the Uniform Criminal Extradition Act, provides complete procedures for extradition of Indians from the Navajo Reser-

vation. And in the very nature of the extradition process, either the State of Arizona or the Navajo Tribe has authority to extradite the Appellee, because as between the tribe and the State, the power cannot be concurrently exercised. Thus, if Arizona is permitted to exercise extradition power over Indians on the Reservation, it will preclude or disrupt the exercise of extradition power by the Navajo government.

Further, the power of extradition over Indians on the Reservation should be examined generally in the context of the Navajo Tribal Court's jurisdiction over criminal offenses by or against Indians committed on the reservation. From the outset of the relationship between the federal government and the reservation tribes, exclusive jurisdiction over Indian offenses on Reservations has always been assumed to reside in the tribal government until Congress explicitly removes it. *See Ex Parte Crow Dog*, 109 U.S. 556, 27 L. Ed. 1030 (1883); 18 U.S.C. §§ 1152-1153 (1964). Since 1959, the Navajo Tribal courts have administered a comprehensive penal code on the Reservation, punishing innumerable Indian offenders, as part and parcel of Tribal self-government. *See Oliver v. Udall*, 306 F.2d 819 (D.C. Cir. 1962). The jurisdiction of the Navajo Tribal Council to proscribe certain behavior as criminal, and the jurisdiction of the Navajo Tribal Courts to enforce the prescriptions of the Tribal Council, is of course limited to behavior within its territorial domain, but within that defined territory the tribal government functions to regulate the conduct of Indians generally as part of the an on-going community, except insofar as Congress has explicitly acted to vest jurisdiction in the federal courts. As discussed above, it has been the long-standing policy of the federal government to strengthen the capacity of the tribal government and courts to perform this critical function. If this tribal court system is to retain the respect of its citizenry which every court needs, if it is to function effectively as a regulator of social conduct, it is crucial that this court system be the vehicle through which criminal prosecution affects

the lives of Indians on the Reservation. The power to extradite is dependent on law, *Hyatt v. New York*, 188 U.S. 691, 47 L. Ed. 657 (1903); *Ex Parte Morgan*, 20 F. 299 (W.D. Ark. 1883), and courts generally are respected as neutral arbiters of the law as between the state and the citizen. For the reservation Indian it is important that his own court system be the arbiter of his liberty. If the Indians' right to govern themselves within the confines of the Navajo Reservation is to be meaningful, it is imperative that their own tribal government be the regulator of every significant aspect of their lives; the citizenry of the states expect no less, and for Indians the distinctiveness of their Reservation culture makes it even more important that the government which has the primary power to deprive them of their liberty is their own tribal government.

## ARGUMENT TWO

### THE PETITIONER WAS PROPERLY GRANTED A WRIT OF HABEAS CORPUS BECAUSE THE JURISDICTION OF THE NAVAJO TRIBAL GOVERNMENT OVER PERSONS ON THE RESERVATION EXTENDS TO ALL INDIANS ON THE RESERVATION.

The Navajo Tribal government undertakes to exercise jurisdiction over all Indians on the Reservation sought by a state or foreign jurisdiction. 7 N.T.C. § 63; 17 N.T.C. §§ 1841-1842. The precise question here is whether the Navajo Tribe's purported jurisdiction over the Appellee, who is a Cheyenne Indian resident of the Reservation is valid, and is exclusive of state jurisdiction.

The 1868 Treaty with the Navajos refers to "Indians" when describing virtually every undertaking by the two parties to the Treaty. See 15 Stat. 667 Arts. I, II, VI, & IX. Of particular importance is Article II which describes the territorial limits of the Reservation and also describes the people to reside thereon. The land is to be,

"... set apart for the use and occupation of the Navajo Tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States to admit among them . . ." 15 Stat. 667 Art. II (12 August 1868).

The language indicates that the U. S. government contemplated at the outset that the population of the Reservation would include Indians of other tribes and that they would be treated in the same manner as Navajos. While the specific question whether the Navajo tribal authority included other Indians was not involved in *Williams v. Lee*, the court's description of the scope of tribal self-government based on the Treaty of 1868 is broad enough to include non-Navajo Indians and to exclude the state:

Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of *the Indians* remained exclusively within the jurisdiction of *whatever tribal government existed.* 358 U.S. at 221-2 (emphasis supplied)

\* \* \*

The cases in this Court have consistently guarded the authority of Indian governments over *their reservation.* 358 U.S. at 223. (emphasis supplied)

The approval of the Navajo extradition law by the Commissioner of Indian Affairs (R. I:48) is likewise phrased in terms of "Indians" and in no way is limited to Navajos. The Commissioner has authority over all Indians (25 U.S.C. § 2) and

Some tribes have exercised [complete] jurisdiction, under express departmental authorization, over Indians of other tribes found on the reservation. This has been justified on the ground that the Department of the Interior may transfer the jurisdiction vested in the Courts of Indian Offenses to Tribal Courts, so far as concerns jurisdiction over members of recognized tribes. FEDERAL INDIAN LAW (1958 ed.) p. 450

Whether the terms of the Commissioner's approval was recognition of the inherent authority in the Navajo government over all

Indians on the Reservation or a delegation of authority is undetermined, but in either case it would appear that the Navajo extradition law validly applies to all enrolled Indians of other tribes found on the Navajo Reservation.

Additionally, the application of the *Williams* test produces the same result. Indians are in many ways a group apart in the United States; because of government policy, and their own traditions, they have not been assimilated into the general population. As a result there appears to be a greater tie between the various Indian peoples than exists between the rest of American society. S. Steiner, *The New Indians*, 268 (1968). Social relations among members of different tribes are common for two reasons at least, the proximity of other Reservations such as the Hopi, Zuni, Jicarilla Apache and White Mountain Reservations, and the attendance of thousands of Indians of different tribes at Bureau of Indian Affairs off-reservation boarding schools. These factors combine to produce a significant number of inter-tribal marriages\* like that of the Appellee. The orderly administration of reservation affairs including application of elaborate civil and criminal laws, depends upon jurisdiction over all Indian families residing therein.

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\* The United States Census Office in Window Rock, Arizona is unable to give precise figures, but stated that there were many Navajos married to non-Navajo Indians living on the Reservation.

## CONCLUSION

For the reasons stated above, this court should find that the exclusive power to extradite Indians from the Navajo Reservation is essential to tribal self-government and that the Governor of Arizona was without power to extradite appellee. Therefore, this court should affirm the order of the District Court ordering the issuance of a writ of habeas corpus releasing appellee from the custody of the Sheriff of Apache County, Arizona.

Respectfully submitted,

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## APPENDIX

## I

## 7 N.T.C. § 63

**Jurisdiction—Generally**

The trial Court of the Navajo Tribe shall have original jurisdiction over:

(a) Crimes. All violations of the Law and Order Code of the Navajo Tribe committed within its territorial jurisdiction by Indians.

(b) Civil Causes of Action. All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction.

(c) Domestic Relations. All cases involving the domestic relations of Indians, such as divorce or adoption matters. Residence requirements in such cases shall remain as heretofore provided in regard to the Navajo Tribal Courts of Indian Offenses.

(d) Decedents' Estates. All cases involving the descent and distribution of deceased Indians' unrestricted property found within the territorial jurisdiction of the court.

(e) Miscellaneous. All other matters over which jurisdiction has been heretofore vested in the Navajo Tribal Courts of Indian Offenses, or which may hereafter be placed within the jurisdiction of the Trial Court by resolution of the Tribal Council.

## II

**17 N.T.C. § 1841. Indian Committing Crime Outside Indian country—apprehension on Reservation.**

Whenever the Chairman of the Tribal Council is informed and believes that an Indian has committed a crime outside of Indian country in Arizona, New Mexico, or Utah and is present on the

Navajo Reservation using it as an asylum from prosecution by the state, the Chairman may order any Navajo policeman to apprehend such Indian and deliver him to the proper state authorities at the Reservation boundary.

17 N.T.C. § 1842.—Hearing; release

If any person being arrested as provided in section 1841 of this title so demands, he shall be taken by the arresting policeman to the nearest Court of the Navajo Tribe, where the judge shall hold a hearing, and if it appears that there is no probable cause to believe the Indian guilty of the crime with which he is charged off the Reservation, or if it appears that the Indian probably will not receive a fair trial in the state court, the judge shall order the Indian released from custody.

STATE OF ARIZONA )  
                      )  
                      )    ss.  
COUNTY OF APACHE )

THEODORE R. MITCHELL, being first duly sworn, upon oath deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

THEODORE R. MITCHELL

SUBSCRIBED AND SWORN to before me this 25th day of June, 1968.

GENEVIEVE DENETSONE  
Notary Public

My Commission Expires:  
March 7, 1969



No. 22781 ✓

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HUGH WENDELL MacDONALD,

Appellant,

vs.

AUG 5 1968

JAMES A. MUSICK,

Appellee.

---

BRIEF OF PEOPLE OF STATE OF CALIFORNIA,

Appellee

CECIL KICKS,  
District Attorney, County of Orange

MICHAEL CAPIZZI  
Deputy District Attorney

OMERITA SFARS  
Deputy District Attorney

P. O. Box 808  
Santa Ana, California

Attorneys for Appellee

FILED

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B. LUCK, CLERK



## INDEX

Page

1	Opinion below	1
2	Questions presented	1
3	Statutes involved	2
4	Statement	2
5	Summary of Argument	2
6	Argument:	
7	I. Dismissal of the appeal by the United States 8 9 Supreme Court is a final determination of the inapplicability of the state statute in this case...	6
10	II. The denial of certiorari implies a finding by the Supreme Court of the United States that Appellant's constitutional rights have not been violated...	12
11	III. The record clearly shows that there was probable cause for the arrest and that at no stage of the trial was the prosecution conducted on the basis of Section 834(a) ...	14
12	IV. Even if Section 834(a) of the California Penal Code were applicable to this case, the writ should be denied because the Section is not violative of the constitution of the United States...	16
13	V. The statements made by the prosecution do not support Appellant's charge of "manifest bad faith in pressing charges"...	18
14	Conclusion	25



1                   **CITATIONS**

	<u>CASES</u>	<u>PAGE</u>
3	Cramp v. Bd. of Pub. Inst. of Orange County, Fla. 368US 278,82,SCT 275, 7L.Ed.Id. 285	15
4	Congress of Ind. Org. v. McAvery 325 U.S. 472,65 S.Ct. 1395	22
6	Ex Parte Hawk, 321 U.S.114, 88L.Ed. 572	11
7	Henry v. Louisiana, 88 S.Ct. 2274	13
8	Largent V. Texas, 318 U.S. 418,87L.Ed. 873	10
9	Mills v. Ragen, 77F Supp. 15,18	11
10	Mooney v. Holohan, 7F Supp. 385	12
11	People v. Burns, 198 C.A.2d. 839	17
12	People v. Coffey, 60 Cal Rptr 459, 468	12
13	People v. Craig, 152 Cal 42, 9p. 997	16
14	People v. Perry, 79 C.A.2d 906, 180P 2d 465	16
15	People v. Weitzel, 201 Cal 116, 255 p. 792	17
16	Smith v. United States, 223 F. 2d 750	11
17	State v. Koonce, 89 N.J. Super. 169,214A. 2d. 428	17
18	Wainwright v. City of New Orleans 88S. Ct.2243 Statutes	13
20	Cal.Pen. Code Sec. 834a	2,6,11,14,16
21	Cal.Pen.Code Sec. 148	2,3,4
22	Cal.Veh.Code Sec. 23102	2,15
23	Cal.Veh.Code Sec. 23123	15
24	28 U.S.C. Sec. 1257	6,9,12
25	28 U.S.C. Sec. 2241(c)(3)	11



1  
2  
3           UNITED STATES COURT OF APPEAL  
4           FOR THE NINTH CIRCUIT  
5

6 JAMES A. MUSICK,  
7           Appellee.  
8

9 HUGH WENDELL MacDONALD,  
10          Appellant.  
11

---

12           BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA  
13

---

14           OPINION BELOW  
15

16       The district court's order of November 27, 1967 denied  
17 the writ. The court's reasoning upon which the denial is  
18 based is set forth at pages 25 to 31 Volume Two of the  
19 reproduced transcript of record.

20           QUESTIONS PRESENTED  
21

- 22       1. Whether the jurisdiction of the district court was  
23           properly invoked in the request of a Writ of Habeas  
24           Corpus which requires the adjudication of the  
25           constitutionality of a California State Statute after  
26           the United States Supreme Court's dismissal of  
            defendant's appeal for want of jurisdiction.



- 1      2. Whether a substantial federal question has been  
2      presented by appellant.  
3      3. Whether appellant was denied due process of law.

4                    STATUTES, RULES AND REGULATIONS INVOLVED

5      California Penal Code Section 834(a) Resistance to  
6      Arrest.

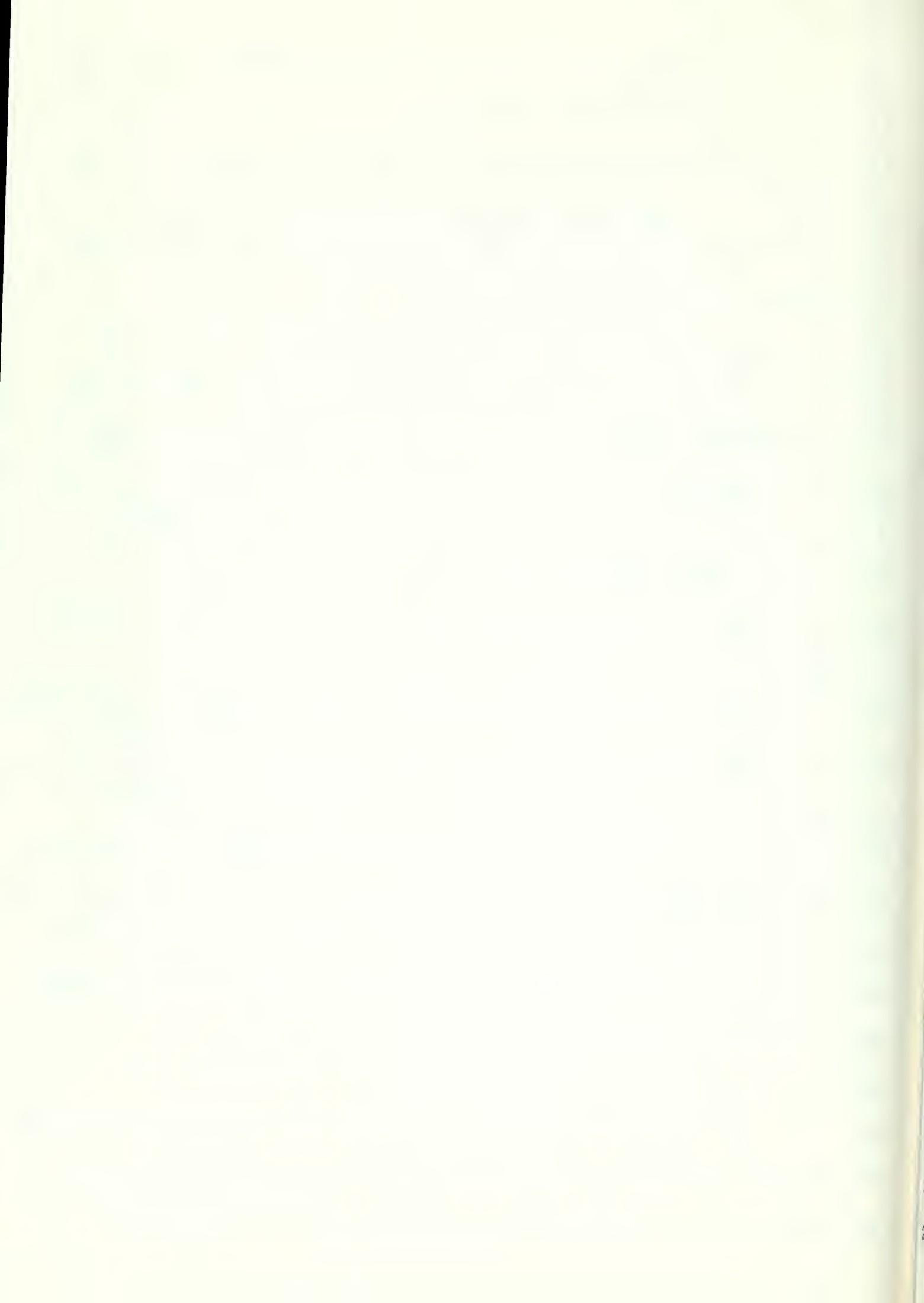
7      If a person has knowledge, or by the exercise of  
8      reasonable care, should have knowledge, that he is  
9      being arrested by a peace officer, it is the duty of  
0      such person to refrain from using force or any weapon  
1      to resist such arrest (Added Stats. 1957, c2147,  
2      p.3807, Section 10.)

3      California Penal Code Section 148 - Resisting Public  
4      Officers in the Discharge of their Duties: Penalty.

5      Every person who wilfully resists, delays, or obstructs  
6      any public officer, in the discharge or attempt to  
7      discharge any duty of his office, when no other  
8      punishment is prescribed, is punishable by a fine not  
9      exceeding one thousand dollars, or by imprisonment in a  
20     county jail not exceeding one year, or by both such  
21     fine and imprisonment (Enacted 1872; AM. Stats. 1957  
22     ch. 139, Section 30).

23                    STATEMENT

24      On January 9th, 1965, appellant was arrested in Orange  
25     County and was charged with Violation of California Vehicle  
26     Code Section 23102 which prohibits driving any vehicle on a



1 public highway while under the influence of alcohol. An  
2 additional count charging Violation of California Penal Code  
3 Section 148 was added prior to the trial of the case.

4 Defendant was arraigned on January 14, 1965, on the  
5 charge of driving while under the influence of intoxicating  
6 liquor. On January 26th Deputy District Attorney Thomas A.  
7 Reilley moved to dismiss if defendant would stipulate to the  
8 existence of probable cause for the arrest. Defendant having  
9 refused to so stipulate the motion was withdrawn by Mr.  
0 Reilley. On February 2nd, Mr. Thomas A. Reilley having  
1 terminated his employment with the office of the District  
2 Attorney, Mr. Dave Bach Jr., assistant district attorney,  
3 and Mr. Harold Minyard, the deputy district attorney to whom  
4 the case had been re-assigned for trial requested the court's  
5 permission to amend the complaint by adding a charge of  
6 resisting arrest. The hearing on this motion was had on  
7 February 3rd and the motion was granted (See Trial Record).

8 During the argument of the February 3rd motion, Mr.  
9 Dave Bach Jr., Assistant District Attorney stipulated that  
20 "six deputy district attorneys indicated either displeasure  
21 with the case, or that it was a weak case, or that they  
22 would not care to prosecute it" (Trial Record 14-15).  
23 He further stipulated that if Mr. Wells, one of the deputies,  
24 were called to testify he would admit having stated to  
25 appellant's attorney that "it appears that the police  
26 department has a hard on against this defendant and are out

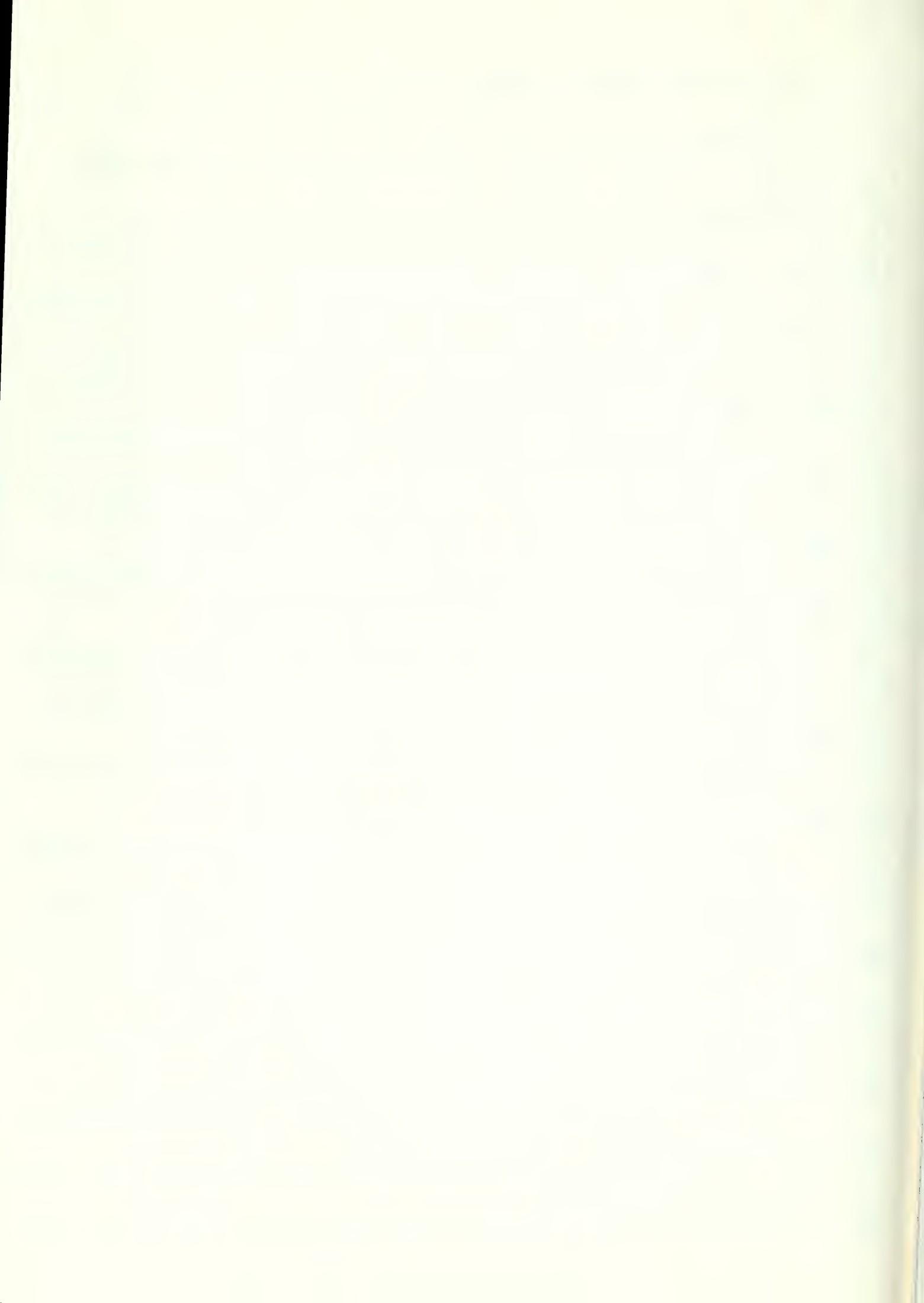


1 to get him' or words to that effect" (Trial record 15-17).

2 A trial by jury was had on February 11, 1965. The  
3 evidence indicated that on the evening of January 8, 1965,  
4 appellant was observed driving along a street in an unusual  
5 manner. When the officer noticed the passenger in appellant's  
6 car putting a wine bottle to his lips and apparently drinking  
7 from it, and casting it out of the window onto a public beach  
8 area, the automobile was stopped. The officers testified  
9 that defendant was unsteady in his gait, that his eyes were  
0 glassy, that he refused a field sobriety test claiming a bad  
1 leg (Trial Record 83-89). Defendant admitted to having  
2 resisted the officers in the discharge of their duties while  
3 at the police station (Trial Record 83-89).

4 The jury found the appellant Not Guilty of the drunken  
5 driving charge but guilty of a violation of Section 148 of  
6 the California Penal Code. Appellant was sentenced to a fine  
7 of \$250 plus penalty assessments.

8 On February 15, 1966, the Appellate Department of the  
9 Superior Court affirmed appellant's conviction. Certifica-  
0 tion of the case to the District Court of Appeals was denied  
1 by the Appellate Department of the Superior Court and the  
2 judgment became final on March 9, 1966. Appellant appealed  
3 to the United States Supreme Court and appellee filed a  
4 motion to dismiss. The Supreme Court of the United States  
5 granted appellee's motion and dismissed the appeal for "want  
6 of jurisdiction." Treating the documents as a request for



1 certioriari, it denied certioriari.

2 On April 7th, 1967 Appellant petitioned the United  
3 States District Court, Central District of California, for a  
4 Writ of Habeas Corpus. After a hearing, that Court by order  
5 No. 67-498-1H entered and filed August 18, 1967 denied the  
6 petition on the ground that defendant had no standing to  
7 prosecute a petition for the writ because he was not in  
8 custody.

9 On September 29, 1967 the Appellant once more  
10 petitioned the United States District Court, Central District  
11 of California, for a Writ of Habeas Corpus. The court,  
12 having considered the petition on the merits denied the  
13 petition by order No. 67-1432-JWC entered and filed November  
14 27, 1967.

15 The case is now pending before this court on appeal  
16 from that denial.

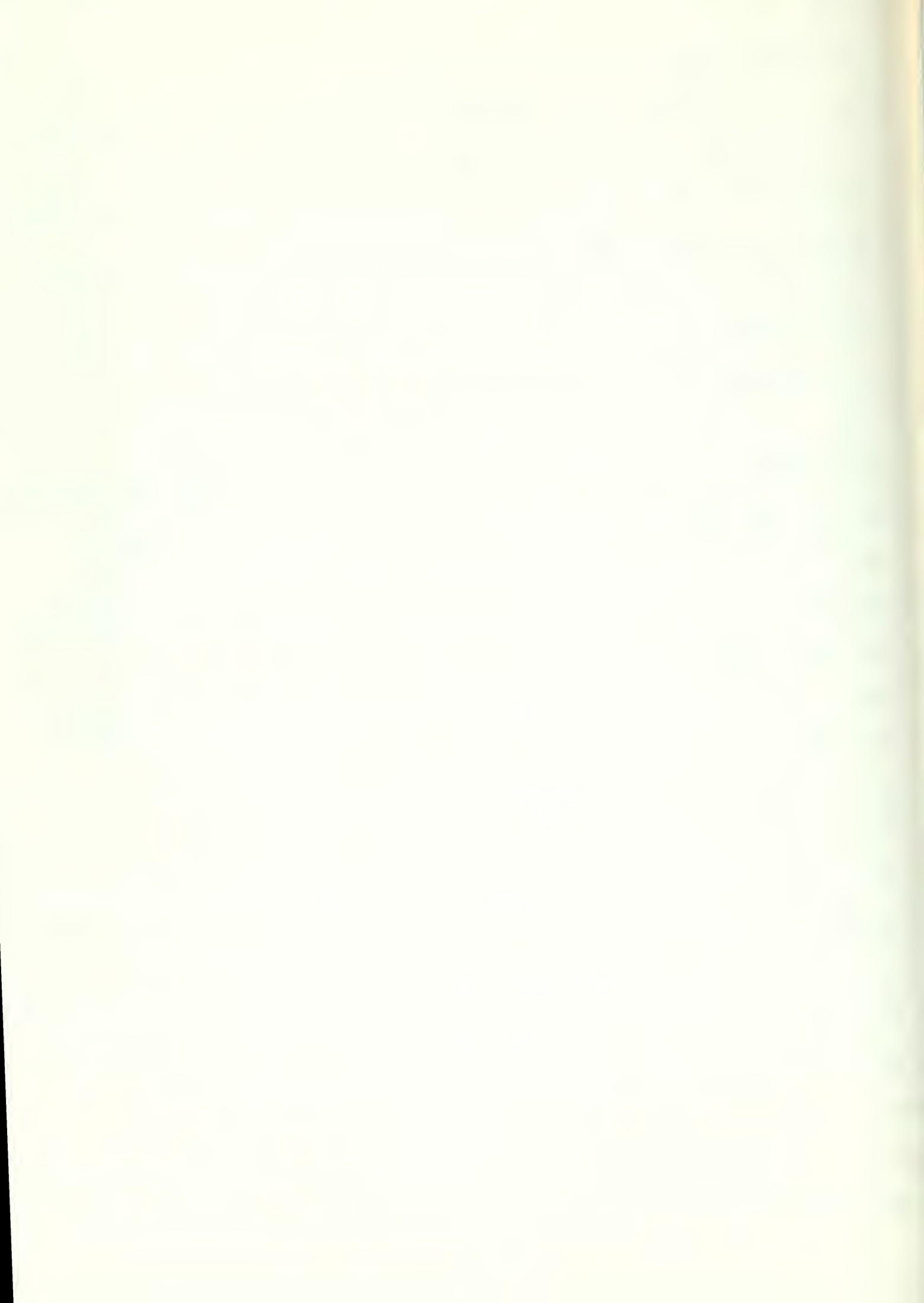
17 SUMMARY OF ARGUMENT

18 I

19 The granting of appellee's motion to dismiss the appeal  
20 by the Supreme Court of the United States is a final  
21 adjudication on the applicability of the state statute to the  
22 decision of this case and appellant should not be allowed to  
23 relitigate that issue on Habeas Corpus proceedings.

24 II

25 Denial of certioriari implies a finding by the Supreme  
26 Court of the United States that defendant's constitutional



1 rights have not been violated.

2  
3 III

4 The record clearly shows that there was probable cause  
5 for the arrest; that at no stage of the trial was the  
6 prosecution conducted on the basis of Section 834(a) and  
7 hence that the constitutionality of the statute is not in  
question.

8 IV

9 Section 834(a) of the California Penal Code is  
10 constitutional hence appellant has not raised a federal  
11 question.

12 V

13 The statements allegedly made by deputy district  
14 attorneys not involved in the prosecution of the case are  
15 immaterial and do not show the manifest bad faith of the  
16 prosecution in pressing charges alleged by appellant.  
17 Appellant, therefore, has failed to prove lack of due process.

18 ARGUMENT

19 Dismissal of the appeal by the United States Supreme  
20 Court is a final determination of the inapplicability  
21 of the state statute in this case.

22 In determining and delineating the jurisdiction of the  
23 Supreme Court of the United States Section 28USC1257 states:

24 Final judgments or decrees rendered by the  
25 highest court of a state in which a decision  
could be had may be reviewed by the Supreme  
Court as follows:

26 1. By appeal where is drawn in question the



1 validity of a statute of any state on the  
2 ground of its being repugnant to the  
3 Constitution, Treaties or Cases of the  
4 United States and the decision is in  
5 favor of its validity.

- .....
- 6 3. By Writ of Certiorari where the validity of a  
7 state statute drawn in question on the  
8 ground of its being repugnant to the  
9 Constitution, Treaties or laws of the United  
10 States, or where any title, right, privilege  
11 or immunity is specially set up or claimed  
12 under the Constitution.

13 Under the above statute the Supreme Court has appellate  
14 jurisdiction if there is a claim of unconstitutionality of a  
15 state statute which has been declared constitutional by the  
16 state court in all cases where a party has standing to sue and  
17 where the statute which has been declared constitutional is  
18 necessarily involved in the determination of defendant's  
19 guilt.

20 A careful scrutiny of the pleadings involved in the  
21 appeal filed with the United States Supreme Court in this case  
22 and a comparison with the jurisdictional requirements set  
23 out above gives clear meaning to the opinion rendered by the  
24 Supreme Court.

25 The record (supplemented by the transcripts lodged with  
26 this honorable Court) shows the following facts:

27 The constitutionality of a state statute as well as  
28 lack of due process were strongly alleged by Appellant in his  
29 petition to the Supreme Court.

30 The Supreme Court, while having the case under consider-  
31 eration and prior to issuing its opinion requested knowledge



1 of whether the case had been reviewed by the Supreme Court  
2 of the State of California (See Attachment A).

3 The District Attorney filed an "Additional Response  
4 Regarding Jurisdiction" sustaining appellant's contention  
5 that the remedies in the state court including Habeas Corpus  
6 proceedings had been exhausted because not available (See  
7 Appellant's Supplemental Brief re Jurisdiction In The Supreme  
8 Court of the United States - October Term 1966 No. 503 Misc.  
9 p.5; cf Additional Response Regarding Jurisdiction filed by  
10 appellee in the same proceedings).

11 Appellee filed with the Supreme Court a motion to  
12 dismiss alleging that the state statute claimed to be  
13 unconstitutional was not directly drawn in question in the  
14 lower courts and was not crucial to the disposition of this  
15 case; that the record on its face showed the arresting officer  
16 to have probable cause for the arrest and therefore that there  
17 was a presumption in favor of the legality of the arrest; and  
18 that the conviction of defendant could well have been and was  
19 in fact determined on factors other than the alleged  
20 "manifest bad faith of the prosecution."

21 The Supreme Court bottoming its ruling on a review of  
22 the "statement of jurisdiction, the motion to dismiss and the  
23 transcript of record" states:

24 On consideration whereof, it is ordered by  
25 this court that the motion to dismiss the  
26 appeal herein be, and it is hereby, granted.  
It is further ordered that the appeal herein  
be, and it is hereby, dismissed for want of  
jurisdiction."



1        In light of the provisions of 28 USC 1257(1) supra,  
2 and of the proceedings above stated, what can be the meaning  
3 of the granting of the motion to dismiss, of the dismissal of  
4 the appeal for want of jurisdiction, and of the court's  
5 denial of certioriary?

6        To say, as appellant does, that the court's decision  
7 stems from one of a myriad of possibilities, or to dismiss the  
8 order of the court as "confusing because the Supreme Court  
9 dismissed the case for lack of jurisdiction rather than for  
10 want of a substantial federal question as is their usual prac-  
11 tice in discretionary dismissal of this nature" (R.T. on  
12 appeal p.5) is without justification. The statements  
13 presumes sloppiness on the part of the highest court of the  
14 land. Such presumption is unwarranted and contrary to legal  
15 principles which advocate just the opposite.

16       The meaning of the order must rather be diligently  
17 sought in a determination of which of the requisites to the  
18 jurisdiction of the court are lacking in appellant's case.

- 19       1. Has the statute in question been declared  
20                  constitutional by the highest state court  
21                  available to appellant?

22       The answer is yes. While the determination of the  
23 statute's constitutionality was not made by the Supreme  
24 Court of the State of California, it had been made by the  
25 highest court available to defendant and this is sufficient  
26 to satisfy the requirement. The case at hand in no way



1 differs from Largent v. State of Texas 318 US 418. There,  
2 as here, the defendant had obtained an appeal from the  
3 highest court available to him and the Supreme Court granted  
4 certioriary to determine the constitutionality of the state  
5 statute. In light of the authorities, therefore, it can  
6 only be concluded that the court did not lack jurisdiction on  
7 this ground.

8       2. Has Appellant standing to sue?

9 Again, the answer is in the affirmative. Were the  
10 statute involved in a determination of his guilt the penalty  
11 in this case is sufficient even if in the form of a fine.  
12 See Largent vs. State of Texas, supra (defendant in that case  
13 had been fined \$100).

14       3. Is the constitutionality of a state statute in  
15       issue in this case?

16 Since this is the third and last requirement for the  
17 appellate jurisdiction of the Supreme Court it can only be on  
18 this ground that the motion to dismiss was granted and the  
19 appeal dismissed "for want or jurisdiction."

20 This conclusion is further supported by the allegations  
21 supporting appellee's motion to dismiss. Appellee, in  
22 addition, to the constitutionality of the state statute,  
23 alleged that the state statute was not in issue, and that  
24 there had been no denial of due process.

25 Moreover, had the court based its ruling on a  
26 determination of the constitutionality of the California



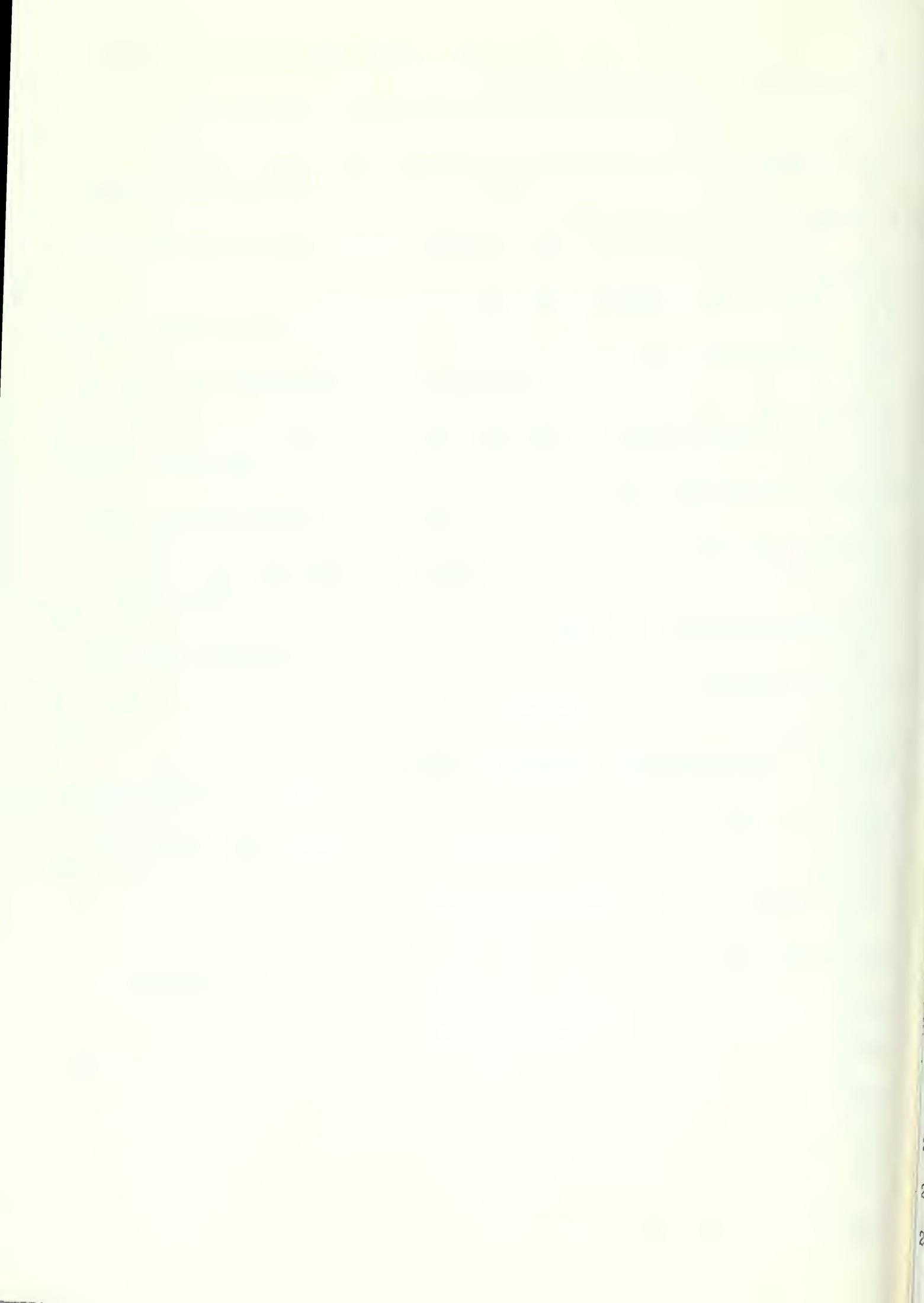
1 statute, it obviously would not and could not have dismissed  
2 for lack of jurisdiction. By a process of elimination  
3 therefore, it can only be concluded that the Supreme Court  
4 based its "want of jurisdiction" ruling upon determining,  
5 after an analysis of the record, that the constitutionality  
6 of the state statute was not in question.

7 For all the above reasons Appellees respectfully submit  
8 that the order of the Supreme Court dismissing the appeal  
9 clearly indicates a finding that appellant's contention that  
10 his conviction was based on 834(a) of the California Penal  
11 Code are without merit. Accordingly, Appellee urge this  
12 court to exercise its discretion by denying the Writ of  
13 Habeas Corpus in that this court cannot find Appellant to be  
14 "in custody in violation of the constitution or laws or  
15 treaties of the United States" as required by 28 USC 2241(C)(3)  
16 See also Smith vs. United States 223 F2d 750.

17 The Supreme Court of the United States in Ex Parte Hawk  
18 321 US 114 sets out the rules controlling the discretion of a  
19 federal court in Habeas Corpus proceedings involving state  
20 court decisions.

21 Where the state courts have considered and  
22 adjudicated the merits of his contentions,  
23 and this court has either reviewed or  
24 declined to review the state court's  
25 decision, a federal court will not ordinarily  
re-examine upon writ of Habeas Corpus the  
question thus adjudicated. See also Mills  
v. Ragen 77 F Supp. 15,18.

26 The wisdom of this rule is beyond argument. Having the



1 Supreme Court of the United States denied an appeal on the  
2 issue now before this court a review of the constitutionality  
3 of the state statute by the highest court of the land would  
4 be less than probable in this case. And since the Supreme  
5 Court of California has recently favorably passed on the  
6 constitutionality of that same statute (See People vs. Coffey  
7 60 Cal. Rptr. 459, 468), the decision of this court would  
8 then be directly in conflict with that decision without hope  
9 of a final resolution. Judicial discretion would thus seem  
10 to require the finding not to be lightly reversed where no  
11 final review is probable. cf Mooney v. Holohan 7 F Supp. 385

## II

13 The denial of certioriari implies a finding by the  
14 Supreme Court of the United States that Appellant's  
15 Constitutional rights have not been violated.

16 The same jurisdictional statute 28 USC 1257(3) supra,  
17 delimits the jurisdiction of the Supreme Court in granting  
18 certioriari. Since that statute provides for jurisdiction  
19 in all cases where a constitutional right has been violated,  
20 it cannot reasonably be argued that had the court found a  
21 lack of due process in appellant's case the court's jurisdic-  
22 tion would have been lacking.

23 Had the Supreme Court determined the constitutionality  
24 of the statute not to have been in question but had it also  
25 found that defendant's constitutional rights of due process  
26 had been violated, it would have granted the motion to dismiss



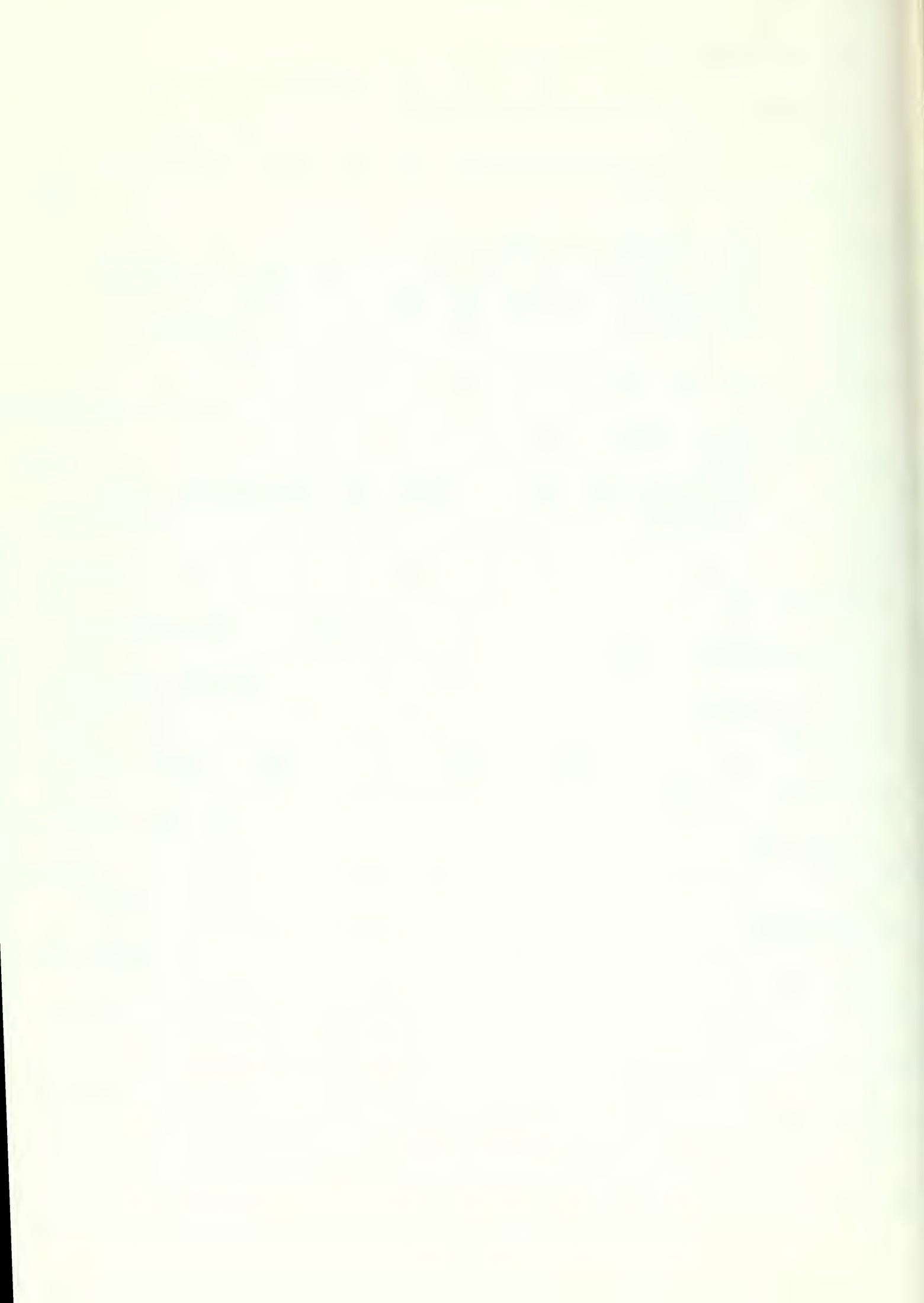
1 the appeal but it could also have granted certioriari, deter-  
2 mined the merits or remanded the case to the state court.  
3 Thus in Henry vs. Louisiana, 88 S.Ct. Rptr. 2274, for example,  
4 the court orders:

5 The motion to dismiss is granted and the appeal  
6 is dismissed for want of jurisdiction. Treating  
7 the papers whereon the appeal was taken as a  
petition for a writ of certioriari, certioriari  
is granted and the judgment is reversed.

8 In the case at hand the court's ruling on the matter of  
9 certioriari merely states:

10 Treating the papers whereon the appeal was taken  
11 as a petition for writ of certioriari, certioriari  
is denied.

12 It is true that, as defendant has contended, the Supreme  
13 Court could have considered this a case of "discretionary  
14 jurisdiction," (RT on appeal p. 5) and thus denied the writ  
15 without qualification. In light of the recent case of Wain-  
16 wright vs. City of New Orleans 88 S. Ct. Rptr. 2243, however  
17 it is far more probable that had the court found the issue to  
18 have been justiciable it would have granted the writ. In that  
19 case defendant had been arrested on suspicion and without  
20 probable cause. He was not tried for any offence except that  
21 of resisting arrest. Certioriari was sought on the ground  
22 that since there was no probable cause for the arrest the ar-  
23 rest was illegal and his conviction for resisting arrest de-  
24 prived him of his freedom from unreasonable seizures. While  
25 the Supreme Court dismissed the writ as improvidently granted  
26 (id at 2244), two concurring and two dissenting opinions were



filed - a clear indicia of the Supreme Court's interest in the matter and of its intention to adjudicate the issue when the opportunity presents itself. It can, therefore, only be concluded that had the Supreme Court found the issue to be justiciable in this case, it would have granted certiorari and its denial can only imply a failure on appellant's part to present a justiciable issue.

三

The record clearly shows that there was probable cause for the arrest and that at no stage of the trial was the prosecution conducted on the basis of Section 834(a).

The decision of the Supreme Court in granting appellee's motion to dismiss is supported by the record. The defendant-appellant was arrested for drunken driving and charged with the additional violation of section 148 of the Penal Code which punishes resisting, delaying or obstructing an officer in the performance of his official duties. At no stage of the trial was the prosecution based or conducted on the basis of Section 834(a).

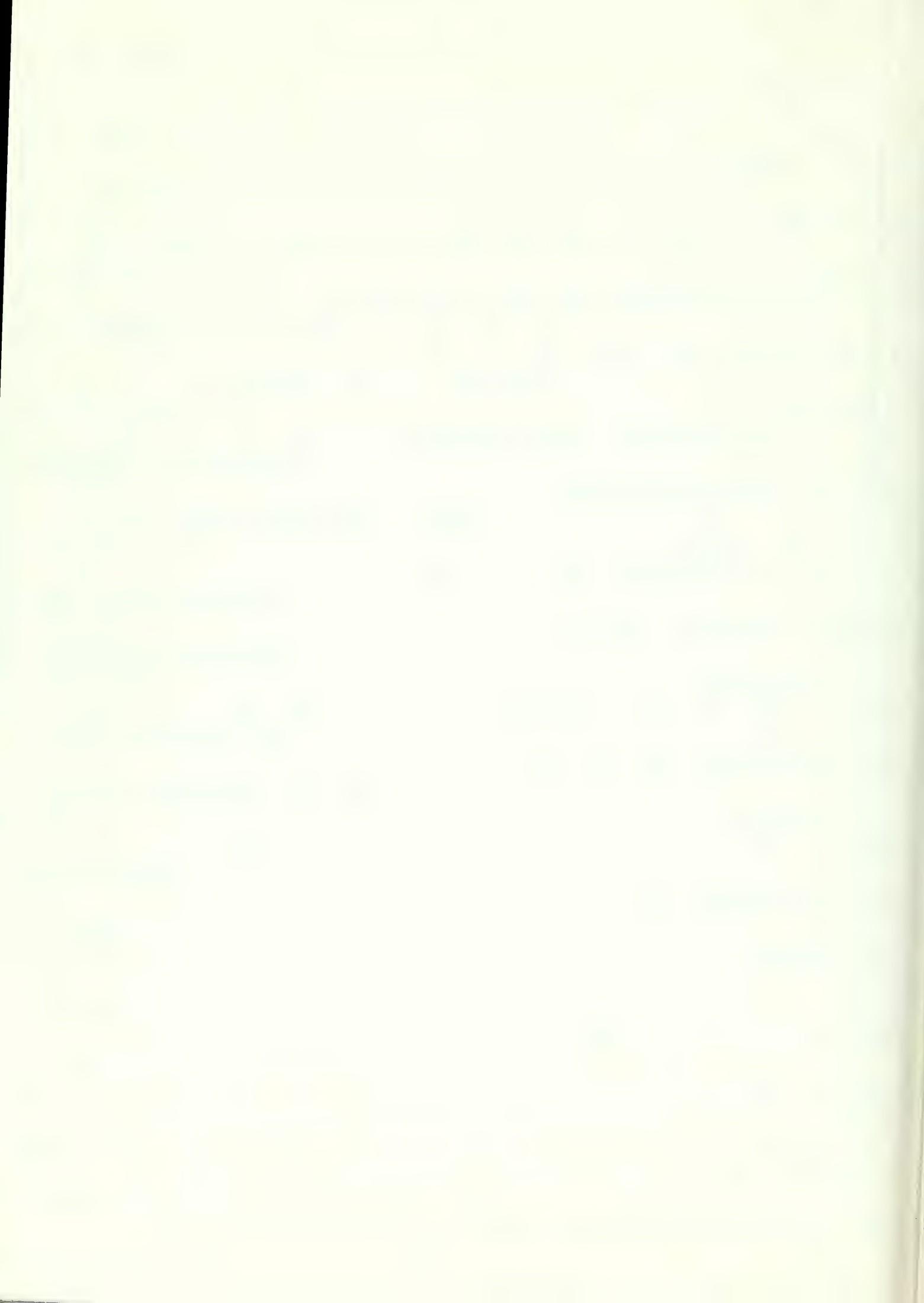
The record shows that the officers noticed defendant's erratic driving and saw defendant's passenger bring a wine bottle to his lips in the motion of drinking and thereafter throw the bottle outside of the car window (Trial Record 83-87). These acts suffice to give the officers reasonable cause to arrest defendant in that they had seen a misdemeanor



1 committed in their presence. Not only did the officers have  
2 reason to believe that defendant might be in violation of the  
3 California Vehicle Code Section 23102(a) which prohibits  
4 driving while under the influence of alcohol but also of  
5 California Vehicle Code Section 23123 which prohibits the  
6 owner of an automobile from allowing open liquor containers  
7 in his car and which imposes upon him the duty of prohibiting  
8 his passengers from possession of such containers.

9 In addition, after stopping the car, the officers testi-  
10 fied that the defendant had a "rather strong odor of alcohol"  
11 on his breath, walked unsteadily, had glassy eyes, and re-  
12 fused to take any type of field sobriety test (Trial Record,  
13 83: 21-89:3). Against the weight of the above evidence, amply  
14 justifying defendant's arrest, the mere fact that appellant  
15 was subsequently acquitted of this charge has no bearing  
16 whatever on the previously existing reasonableness of the  
17 officer's conduct. Thus the legality of the arrest is not  
18 and cannot be made to depend on guilt or innocence but can  
19 only depend on the fact that the officers had probable cause  
20 to believe that the defendant was committing a misdemeanor.

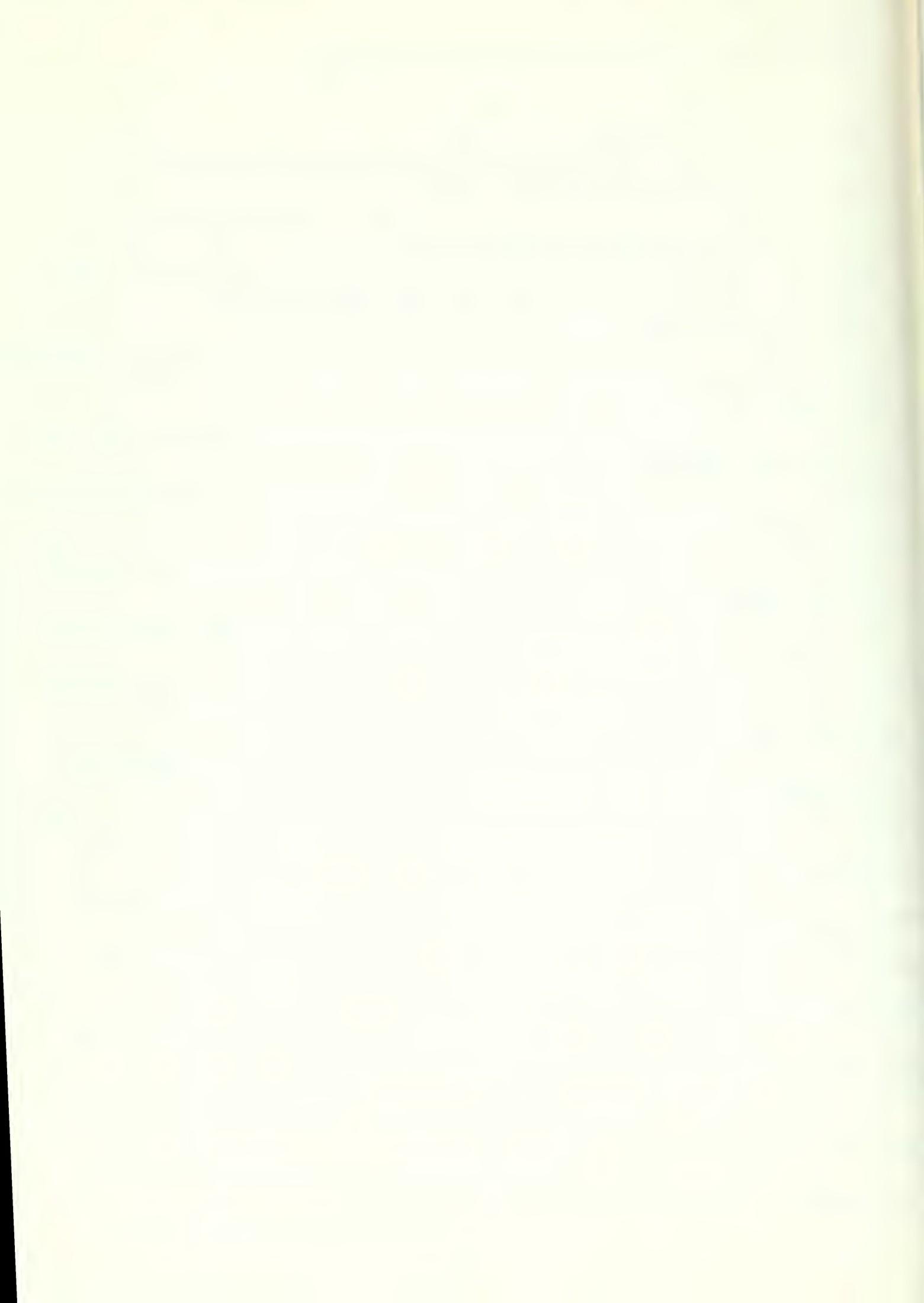
21 The appellant, has shown no facts which indicate that  
22 the arrest was other than lawful. The constitutionality  
23 of Section 834(a), therefore, would not in any way have  
24 altered the outcome of appellant's case and appellant has no  
25 standing to argue against its constitutionality. See Cramp  
26 vs. Board of Public Instruction of Orange County Florida,



2 IV

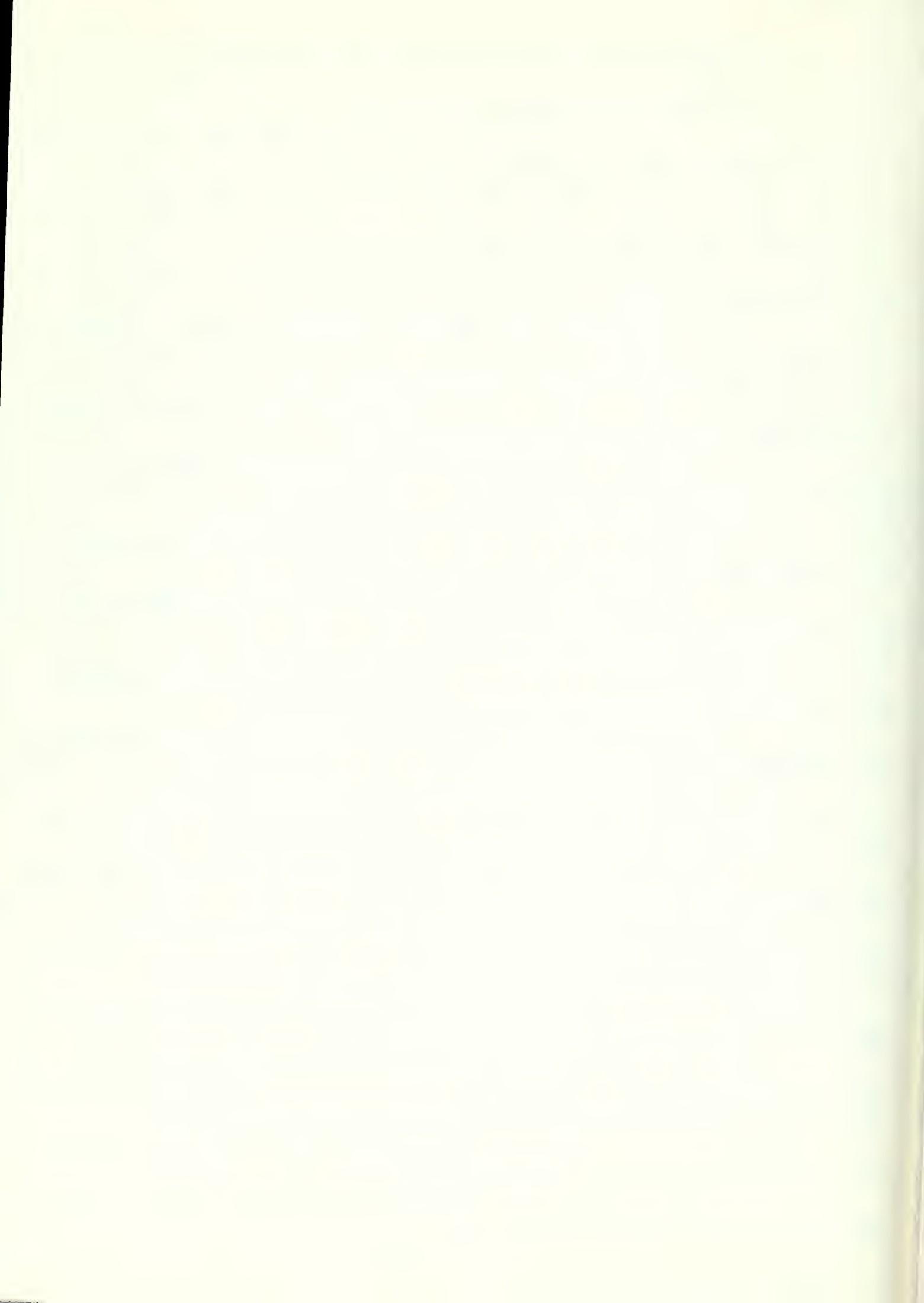
3 Even if Section 834(a) of the California Penal Code  
4 were applicable to this case, the writ should be  
5 denied because the section is not violative of the  
6 of the constitution of the United States.

7 The Legislature of the State of California was properly  
8 within its authority in enacting Penal Code Section 834a,  
9 under the State's police powers to execute and enforce laws  
10 for the general welfare of all its citizens. Section 834a was  
11 designed and intended to replace breaches of the peace which  
12 might, and probably often did, occur when a citizen believed  
13 his liberty was being infringed by an arrest he considered un-  
14 lawful. The legislative intent in enacting Section 834a in  
15 1957 is clear from the fact that prior to the enactment of  
16 this section, the cases in California (See e.g., People v.  
17 Craig, 152 Cal. 42, 9P. 997; People v. Perry, 79 C.A. Id 906.  
18 180 P.2d 465) construed Penal Code Sections 692-694 (which  
19 permit lawful resistance to acts which constitute a public  
20 offense) to include legislative permission to resist an  
21 unlawful arrest. The rationale of those cases was that an  
22 unlawful arrest is a "public offense," hence resistance to  
23 such unlawful arrest was justified and not a crime (See 5 Cal  
24 Jur. 2d 187). Section 834a, however, is wholly devoid of any  
25 distinction between resistance to a lawful and an unlawful  
26 arrest. The omission of any such distinction was clearly



more than inadvertent, since a legislative intent to change current law may be presumed from a new legislative enactment on the same subject. People v. Weitzel, 201 Cal. 116, 255 P. 792. Further, the only reported Calif. decision to directly consider this identical question since enactment of Section 834a upheld Section 834a as constitutional in the face of the argument identical to that made by Appellant here. People v. Burns 198 C.A. 2d. 839. This decision was in accord with the American Law Institute's recommendations in its Model Penal Code, Section 304, subsection 2 (a)(j), which states that one is not privileged to resist an arrest which the actor knows is being made by a peace officer even though the arrest might be unlawful. It was also in accord with the Interstate commission on Crimes' Uniform Arrest Act, Section 5, the equivalent of which has now been adopted in New Hampshire, Rhode Island, Delaware and California, and is now pending as a bill before the New York legislature. New Jersey also adopted the equivalent of Section 5 by judicial decision in 1965. State v. Koonce, 89 NJ Super. 169, 214 A. 2d 428. Recently the Burns decision *supra*, has been cited with approval by the California Supreme Court in People v. Coffey *supra*.

Penal Code Section 834a, it should be noted, does not say that one has a duty to refrain from resisting arrest if the arrest is lawful, but rather requires a person to refrain from using force... whenever he has knowledge or...should have knowledge that he is being arrested by a peace officer..



1 The simple reason for this is that the former rule allowing  
2 resistance to an unlawful arrest often fomented riot or  
3 breach of the peace by making the question of the lawfulness  
4 of the arrest a subjective one, one which the subject of the  
5 arrest could interpret. The 1957 enactment by the legislature  
6 thus was passed to make the law on this matter clear, definite  
7 and subject to uniform interpretation, while at the same time  
8 safeguarding the welfare of the citizenry generally. The  
9 double effect of this new statute, clarification of law and  
10 protection and maintenance of the public peace and welfare, is  
11 most laudable. The statute is consistent with the concept of  
12 due process, especially when balanced against the fact that  
13 one who is unlawfully arrested has a full, adequate, and  
14 peaceful recourse to the courts for redress of this wrong.  
15 When the above factors are weighed against each other, the  
16 scales of due process should balance in favor of the statute,  
17 and leave the relatively few people who are falsely arrested  
18 to their remedies in the courts of law.

19 V

20 The statements made by the prosecution do not  
21 support Appellant's charge of "manifest bad faith  
22 in pressing charges."

23 The United States District Court in ruling on whether  
24 the actions of the deputy district attorney deprived defen-  
25 dant of due process reasoned thus:

26 I have given a lot of thought to this matter. I think  
the difficulty here is a failure to completely under-



1 stand the duties and responsibilities of the police  
2 and the duties and responsibilities of the District  
3 Attorney. When there is a confrontation with the  
law, it is an episode which may give rise to a  
number of offenses.

4 "You say there was no profanity. I don't know. There  
5 could have been profanity here. There could have been a use  
6 of force sufficient to constitute breach of these and perhaps  
7 some other violations that grew out of this incident.

8 But the police determined to charge the defendant with  
9 two violations, one, of course, driving while under the in-  
10 fluence of intoxicating liquor, and the other, resisting an  
11 officer.

12 Now, somewhere along the line the police indicated that  
13 they were not going to prosecute on the second one. Whatever  
14 they may have said, that they were going to drop it or not  
15 prosecute, whatever, they don't have the ultimate decision  
16 as to whether there is going to be a prosecution on it or not.  
17 All they are saying in effect is we are not going to suggest  
18 or recommend, as far as we know that charge is not going to  
19 be prosecuted.

20 With respect to the whole situation it ultimately gets  
21 to the District Attorney. The first thing that the District  
22 Attorney looks at when a case of this kind or, for that matter,  
23 any case comes to him is: Is this the kind of an infraction  
24 of the law, is this such a violation, such a case, when you  
25 look at it within its four corners that justifies the expendi-  
26 ture of public funds to prosecute.



1        Whether the man is guilty or not guilty, is this worth-  
2        while?

3        If the prosecutor prosecuted every case that was brough-  
4        to him by the police and by the people he would require a  
5        staff many, many times what it is. The first thing he does  
6        is determine whether there is sufficient social significance  
7        to justify the expenditure of public funds.

8        I can see in this case, looking at it in the first place  
9        that we have a case of a charge of drunk driving that we can't  
10       substantiate. We do have a case of resisting an arrest, which  
11       they could probably substantiate, but it isn't of sufficient  
12       significance to justify the expenditure of public funds. So  
13       that the District Attorney says, "We are willing to dismiss  
14       it." Whereupon the defendant says he will not stipulate to  
15       probable cause, which is a neon light signaling: "I am going  
16       to bring an action against the City and sue them for false  
17       arrest."

18       Well, that changes the picture. The District Attorney  
19       again evaluates the situation and he says: Whereas this is  
20       a case which did not heretofore justify the expenditure of  
21       public funds, all of a sudden it does become a case which  
22       does justify the expenditure of public funds because we are  
23       going to have to defend this case one time or another, and  
24       since the defendant is not going to stipulate to probable  
25       cause and is going to sue us, we might just as well try it  
26       now when the defendant has got something to lose as well as



1 something to gain, as contrasted to waiting until later when  
2 he hadn't got anything to lose and everything to gain." (RT  
3 on appeal pp. 26:15-29:3)

4 The validity of the Court's argument is self evident.  
5 But in the case now before this court yet another argument is  
6 available. The record and the documents before this court  
7 clearly show that Deputy District Attorney Riley agreed to  
8 move for dismissal of the action because defendant had promis-  
9 ed to stipulate as to the existence of probable cause for the  
10 arrest. When defendant refused to so stipulate, the deputy  
11 was no longer bound by his motion for dismissal. Additionally,  
12 no other deputy could be bound by Deputy Riley's personal  
13 opinion of the case since when the motion to add the count  
14 of resisting arrest was made and granted on February 2 and 3,  
15 1966, Deputy Riley was no longer with the office of the District  
16 Attorney. The deputies to whom the case was assigned, the  
17 only ones who in fact had control of the cause of action,  
18 never stipulated that they thought the case had no merit.  
19 They merely stipulated that "six of the deputy district at-  
20 torneys indicated either displeasure with the case, or that  
21 it was a weak case, or that they would not care to prosecute  
22 it." (Trial Record 14-15)

23 Nowhere in the record does it show that any of them  
24 ever had control of the case. Appellee respectfully submit  
25 that the thoughts of any attorney of member of the District  
26 Attorney's staff, other than of the one charged with the



1 prosecution of the case, are immaterial and cannot possibly  
2 have deprived appellant of any rights.

3 Moreover, any question of bad faith in this case is  
4 moot, since the allegation by appellant of an unmeritorious  
5 prosecution concerns prosecution of the "Driving While Intox-  
6 icated" charge, of which on the trial thereof appellant was  
7 acquitted, and of which acquittal he is not, of course, seek-  
8 ing review (See e.g., Trial Record 7:24-8:34; 13:15-25). While  
9 counsel for Appellant has tried to utilize the stipulations  
10 made by prosecution (regarding what the testimony of certain  
11 deputy district attorneys would be as to the prosecution of  
12 the "Driving While Intoxicated" charge) to somehow prove an  
13 unmeritorious prosecution of the "Interference with an Officer"  
14 charge, Appellant's reasoning under this argument is somewhat  
15 obscure. The stipulations in question, it bears repeating,  
16 concern only the merits of the prosecution of the "Driving  
17 While Intoxicated" charge of which Appellant was acquitted  
18 (Trial Record, 15: 3-23). Because of this acquittal, there  
19 thus exists no genuine controversy as to the motives of the  
20 prosecution, the existence of which controversy this Court  
21 has long insisted upon as a condition precedent to review.

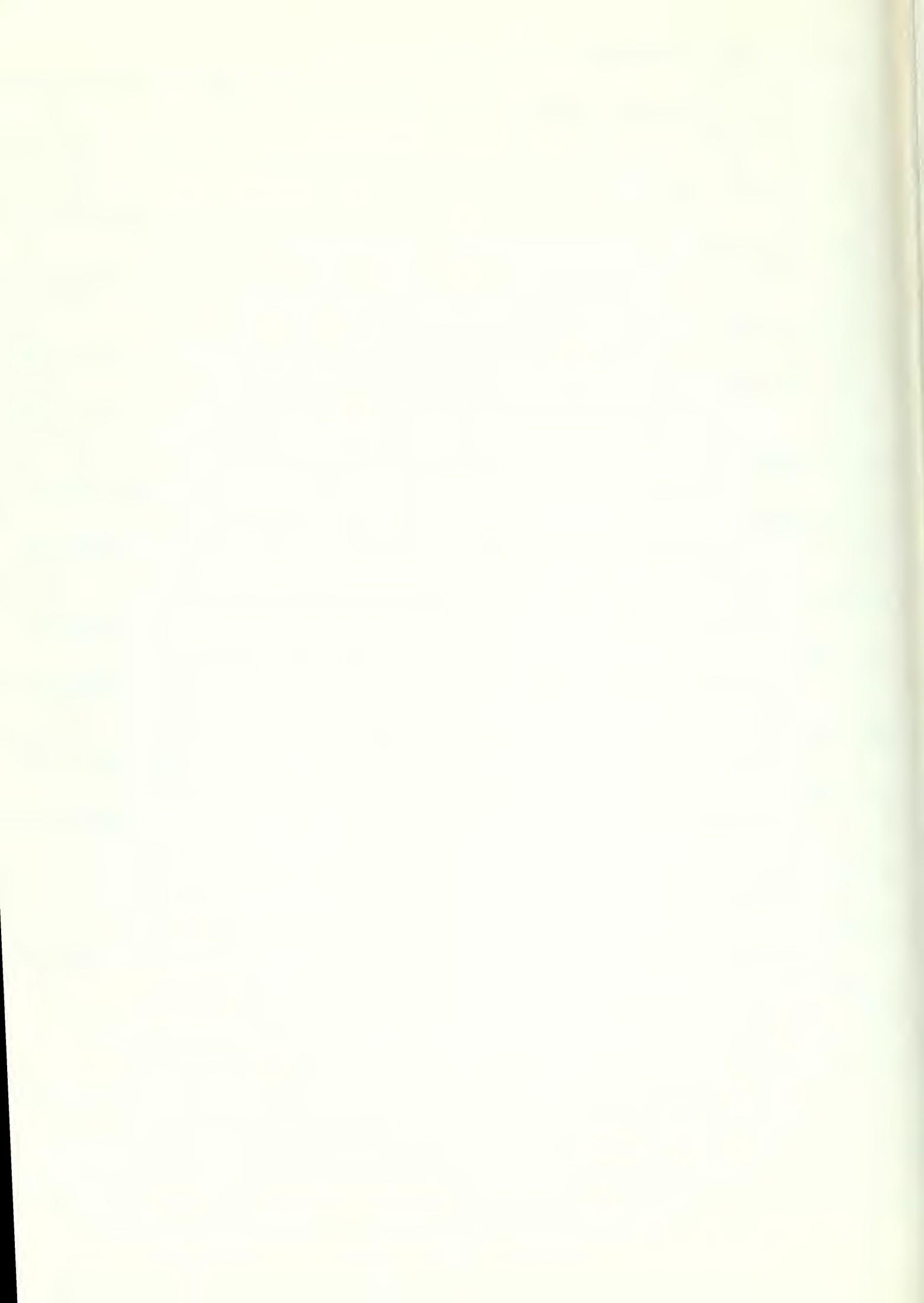
22 Congress of Industrial Organizations v. McAdory, 325 U.S. 472,  
23 65 S. Ct. 1395.

24 But even if the stipulations as to the beliefs of some  
25 of the prosecutors in the District Attorney's office regarding  
26 the unmeritorious nature of the prosecution were found to



1 encompass the prosecution of Appellant on both charges and have  
2 been made by the deputy in charge of the case, such stipulations  
3 do not show either that the prosecution was unmeritorious or  
4 that Appellant was in any way denied due process of law thereby.  
5 Clearly, there was some merit in the prosecution of the "Interference with an Officer" charge or the jury would  
6 not have found the defendant guilty, nor would the Appellate Court have affirmed that finding.  
7 Further, the filing of an amended complaint, even to add a charge which had earlier been deleted from the record of Appellant's arrest, is not "ample evidence of the bad faith, the coercion, the blackjacking of defendant" as the Appellant contends (Trial Record, p.8:18-22).  
8 On the contrary, not only has this been a frequent practice  
9 for no other motive than to protect the people by ensuring  
10 that their laws are enforced, but has long been authorized by  
11 California law (California Penal Code Section 1009; also see Trial Record, p.12:1-14). Furthermore, the prosecution of any  
12 crime has historically been within the discretion of the  
13 District Attorney--if that office believes there is even a  
14 possibility of a conviction they may, within their discretion,  
15 choose to prosecute.

16 Similarly the reference to the police department's  
17 wanting "to get" Appellant (Trial Record p. 12:2-15) being as  
18 it is, heresay of what someone believes yet another party's  
19 motive to be, cannot be found to be, as proposed by Appellant,  
20 the motive for the prosecution of the "Interfering with an



1 Officer" charge since, even if accepted as factual, such  
2 hearsay statement at most would apply only to the particular  
3 state of mind of the police department, and would in no way  
4 reflect the motives of the prosecuting attorneys. And, it is  
5 of course, the motives of these latter individuals which  
6 Appellant is impugning. (Furthermore, from the record it is  
7 entirely unclear as to whether the alleged statement was said  
8 with reference to the drunk driving or the "Interfering with  
9 an Officer" charge.) Thus, the state of mind of the police,  
10 like the stipulations of the District Attorney, in no way  
11 proves that the prosecution of the defendant for interfering  
12 with an officer was in bad faith, and therefore presents no  
13 question of due process in this case.

14 In conclusion Appellees respectfully submit that Appel-  
15 lant's charge of lack of "good faith" is based upon faulty  
16 and illogical reasoning. Although Appellant states that  
17 Appellee prosecuted the "Driving While Intoxicated" charge by  
18 "implementing a second crime to substantiate and win the  
19 first crime" (Trial Record, p. 14:5-14), the precise rational  
20 nexus to explain how the amended complaint was "implemented"  
21 to "substantiate and win" the drunk driving charge is missing.  
22 Additionally, Appellant's allegation of a bad faith prose-  
23 cution by the District Attorney presumes that such bad faith  
24 has been proved as the motive of the District Attorney for  
25 prosecuting this case. There is no such proof in the record;  
26 in fact, such presumption is incontrovertably rebutted by



1 statements, made in open court by counsel for the People,  
2 to the effect that he believed he "could get a conviction of  
3 the drunk driving" (Trial Record p.11:19), and that he be-  
4 lieved that the "Interfering with an Officer" charge was even  
5 stronger than that of "Driving While Intoxicated" (Trial Re-  
6 cord, p.11:23-24).

7 Defendant's argument that by adding the charge of re-  
8 sisting arrest, Appellant's rights are violated because his  
9 chances of being found guilty have been increased by this  
10 addition is specious. It is not the job of the prosecution  
11 to determine guilt or innocence--only the jury can do that--  
12 and only if defendant is guilty of the additional offense  
13 can his chances of being found guilty be increased.

#### CONCLUSION

15 For all of the foregoing reasons it is submitted that  
16 the judgment of the District Court should be affirmed.

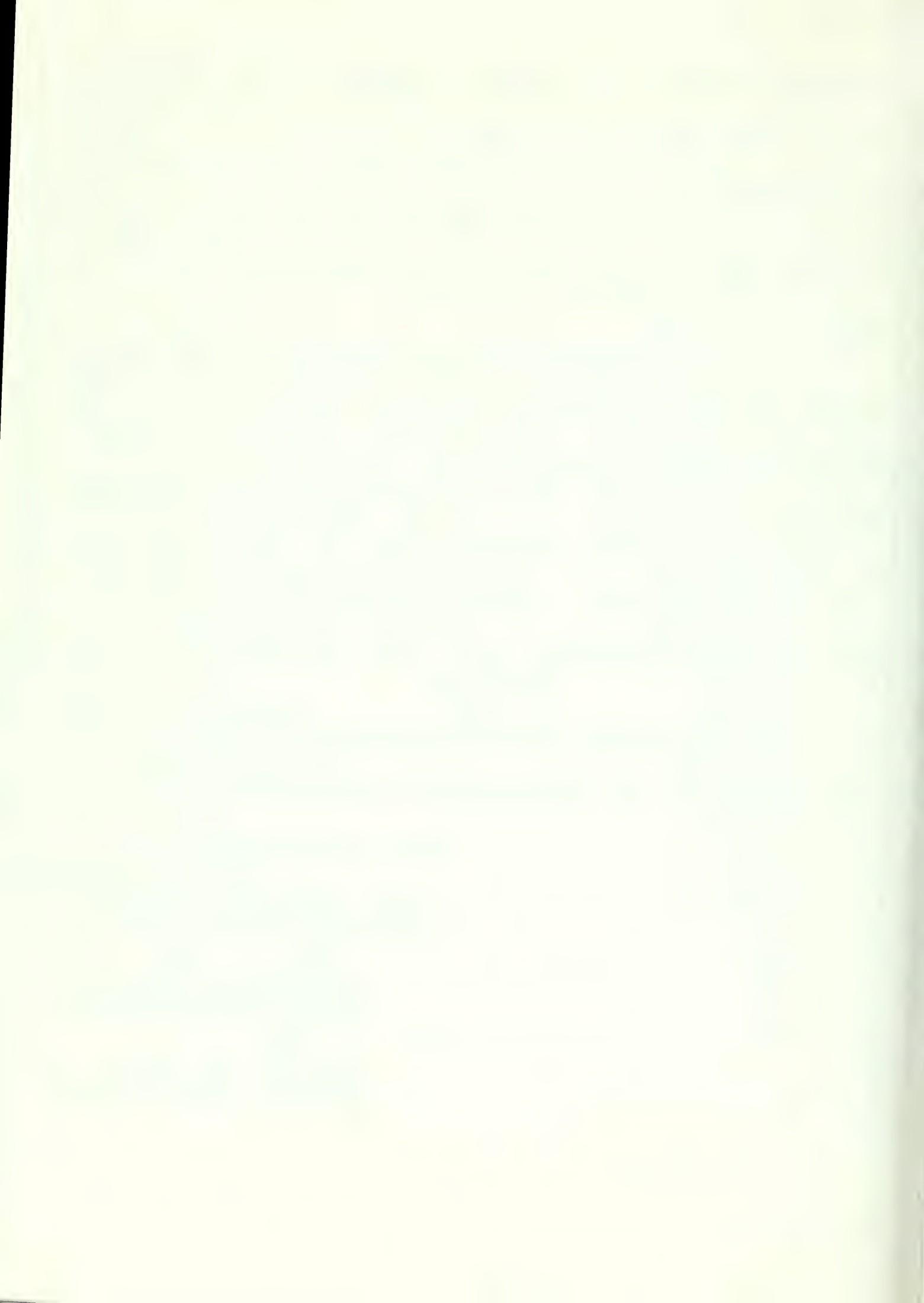
17  
18 Respectfully submitted,

19 CECIL HICKS, DISTRICT ATTORNEY  
20 COUNTY OF ORANGE, STATE OF  
21 CALIFORNIA

22 By: Michael Capizzi, Deputy

23 And

24 By: Oretta D. Sears, Deputy



1 DECLARATION OF SERVICE BY MAIL

2 I, ENID H. KASS, declare:

3 I am a citizen of the United States, over 18 years of  
4 age, and not a party to the within cause; my business address  
5 is 212 West Eighth Street, Santa Ana, California; I served  
6 a copy of the attached Appellee's Answering Brief on each of  
7 the following, by placing same in envelopes respectively  
8 addressed as follows:

9 VASKEN MINASIAN  
10 HILLEL CHODOS  
11 9107 Wilshire Boulevard  
Beverly Hills, California 90210

12 A. L. WIRIN  
13 FRED OKRAND  
14 LAWRENCE R. SPERBER  
257 South Spring Street  
Los Angeles, California

15 Each said envelope was then, on July 31, 1968, sealed  
16 and deposited in the United States mail at Santa Ana,  
17 California, the county in which I am employed, with the  
18 postage thereon fully prepaid.

19 I declare under penalty of perjury that the foregoing  
20 is true and correct.

21 Executed this 31st day of July, 1968, at Santa Ana,  
22 California.

23   
24 ENID H. KASS



No. 22781

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

HUGH WENDELL MacDONALD,  
Appellant,

vs.

JAMES A. MUSICK,  
Appellee.

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BRIEF OF PEOPLE OF STATE OF CALIFORNIA,  
Appellee

CECIL HICKS,  
District Attorney, County of Orange



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MARIA MERCEDES CHAVEZ-MARTINEZ, )  
  )  
  Appellant, )  
  )  
vs.                                   ) NO. 22782 ✓  
  )  
UNITED STATES OF AMERICA,        )  
  )  
  Appellee. )  
  )

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APPELLEE'S BRIEF

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FILED

AUG 20 1968

WM. B. LUCK, CLERK

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

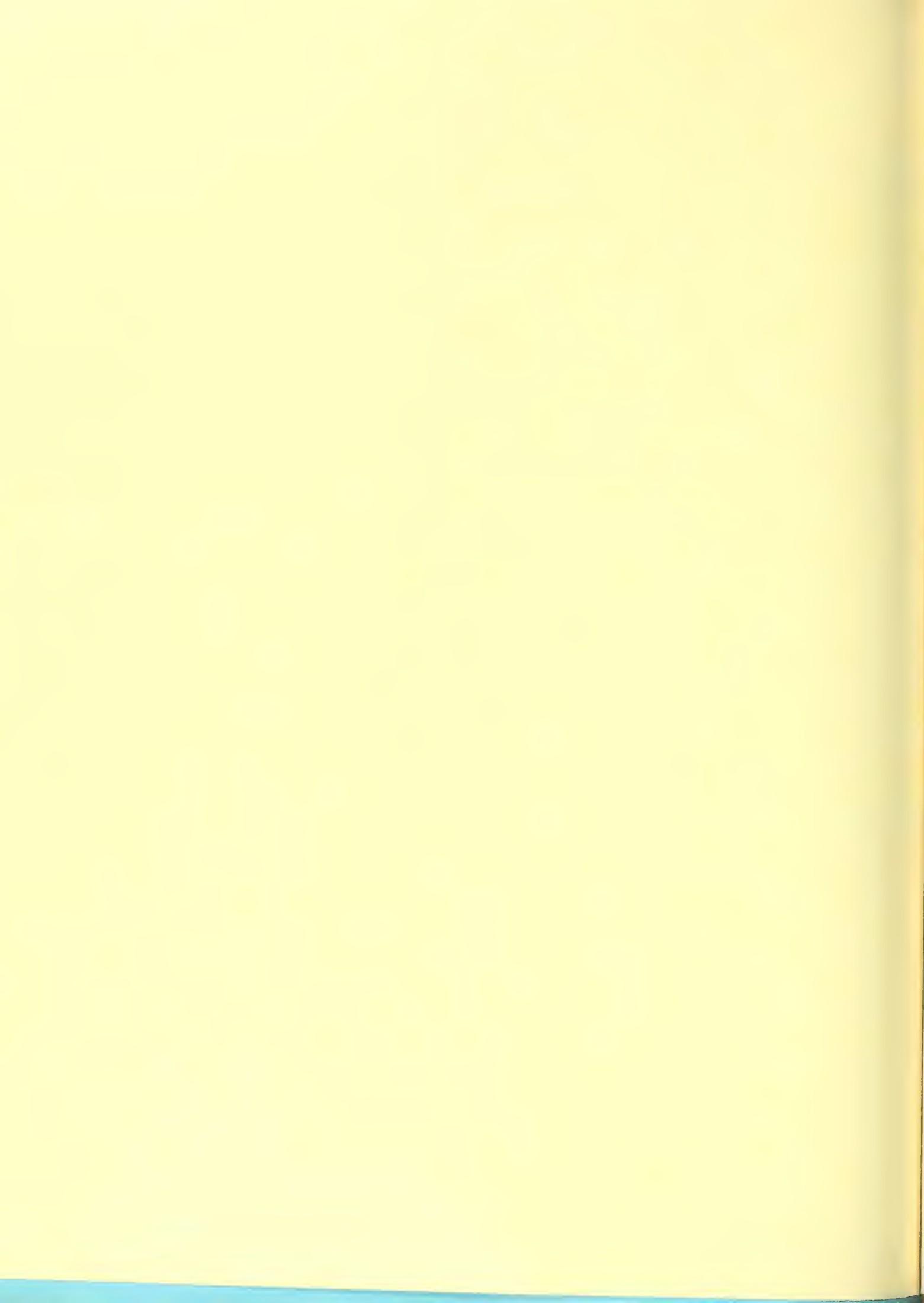
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San Diego, California 92101

Attorneys for Appellee,  
United States of America



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA MERCEDES CHAVEZ-MARTINEZ,      )  
  )  
  )  
  Appellant, )  
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  )  
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UNITED STATES OF AMERICA,                )  
  )  
  Appellee. )  
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APPELLEE'S BRIEF

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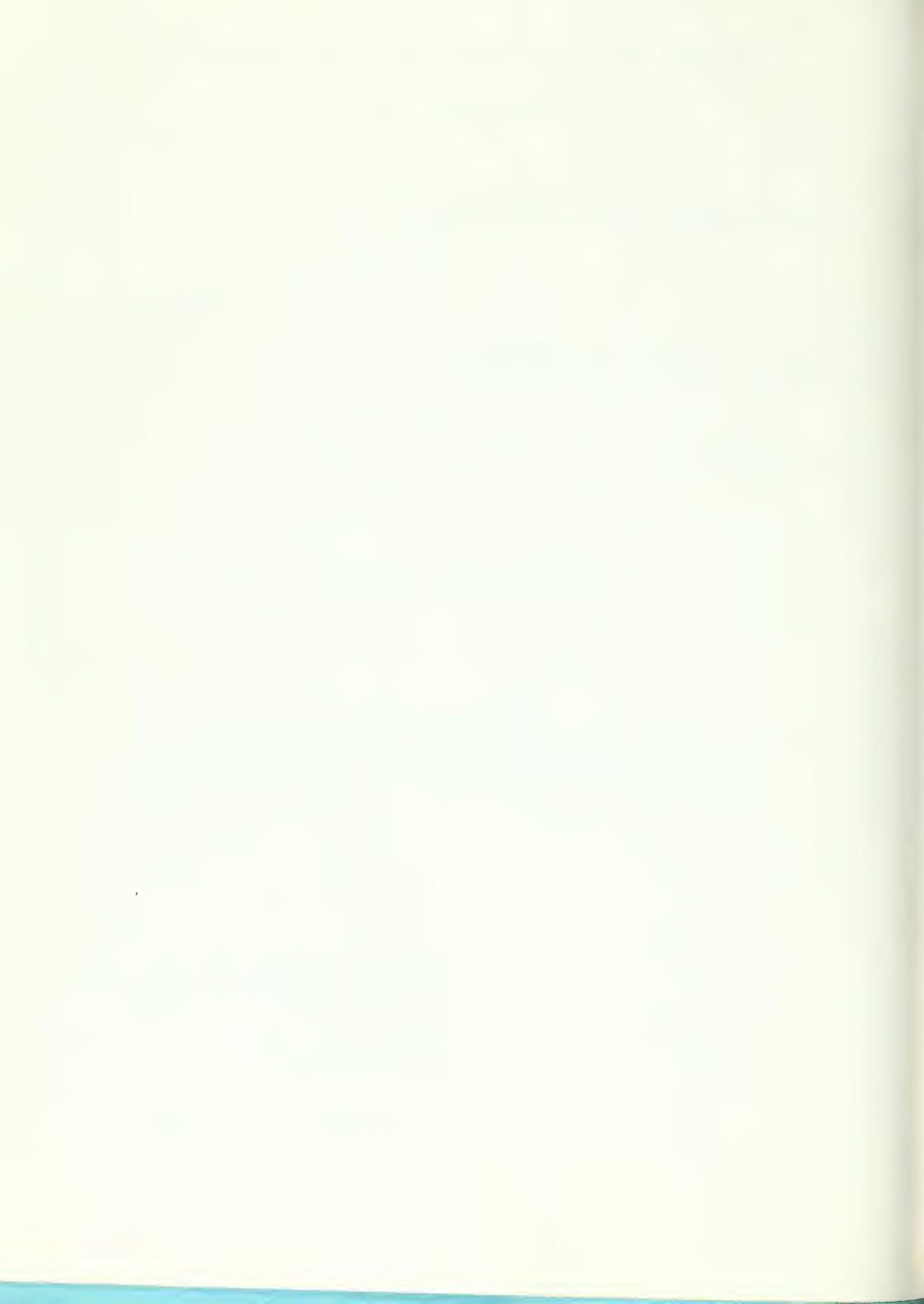
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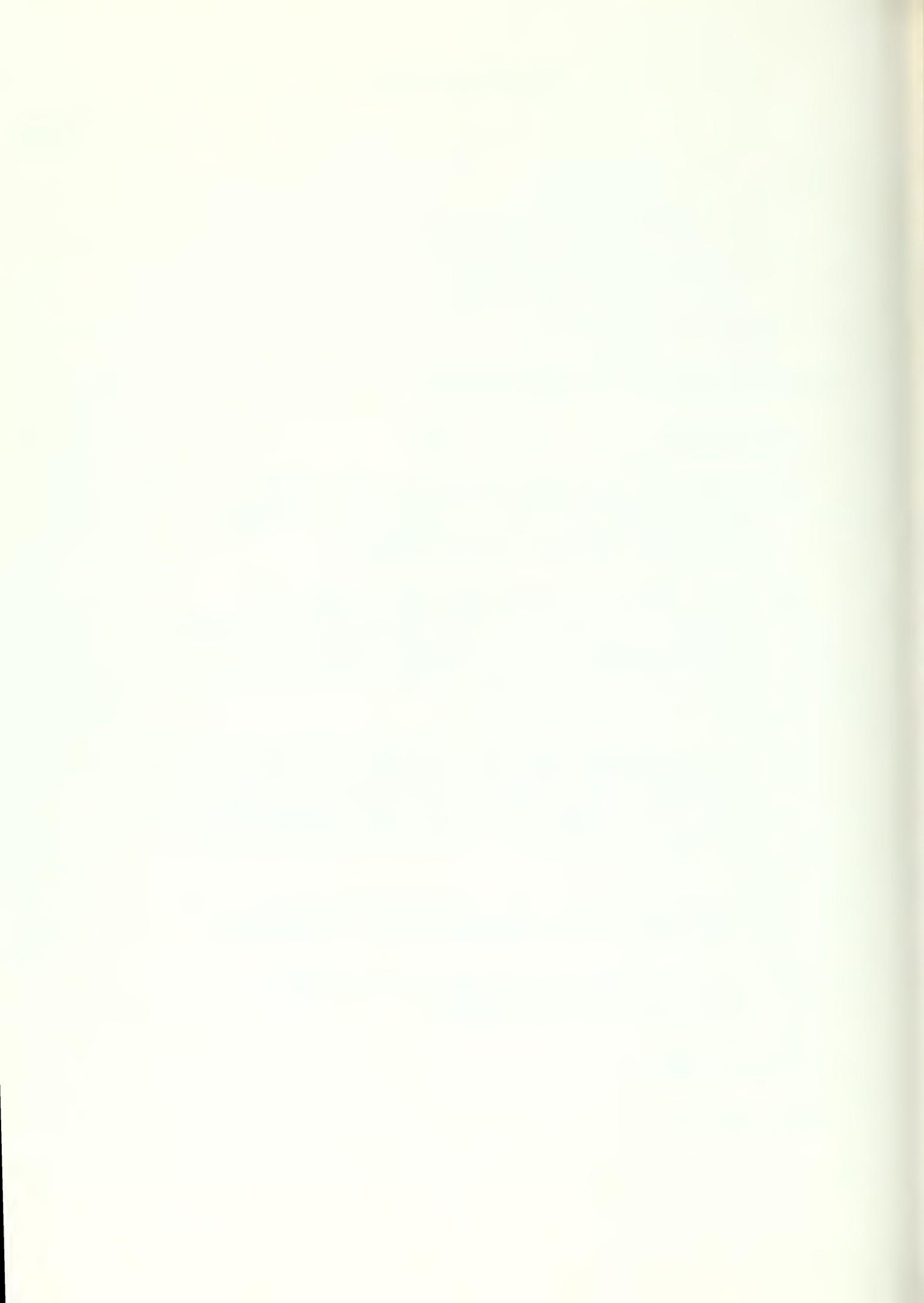
325 West "F" Street  
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Attorneys for Appellee,  
United States of America



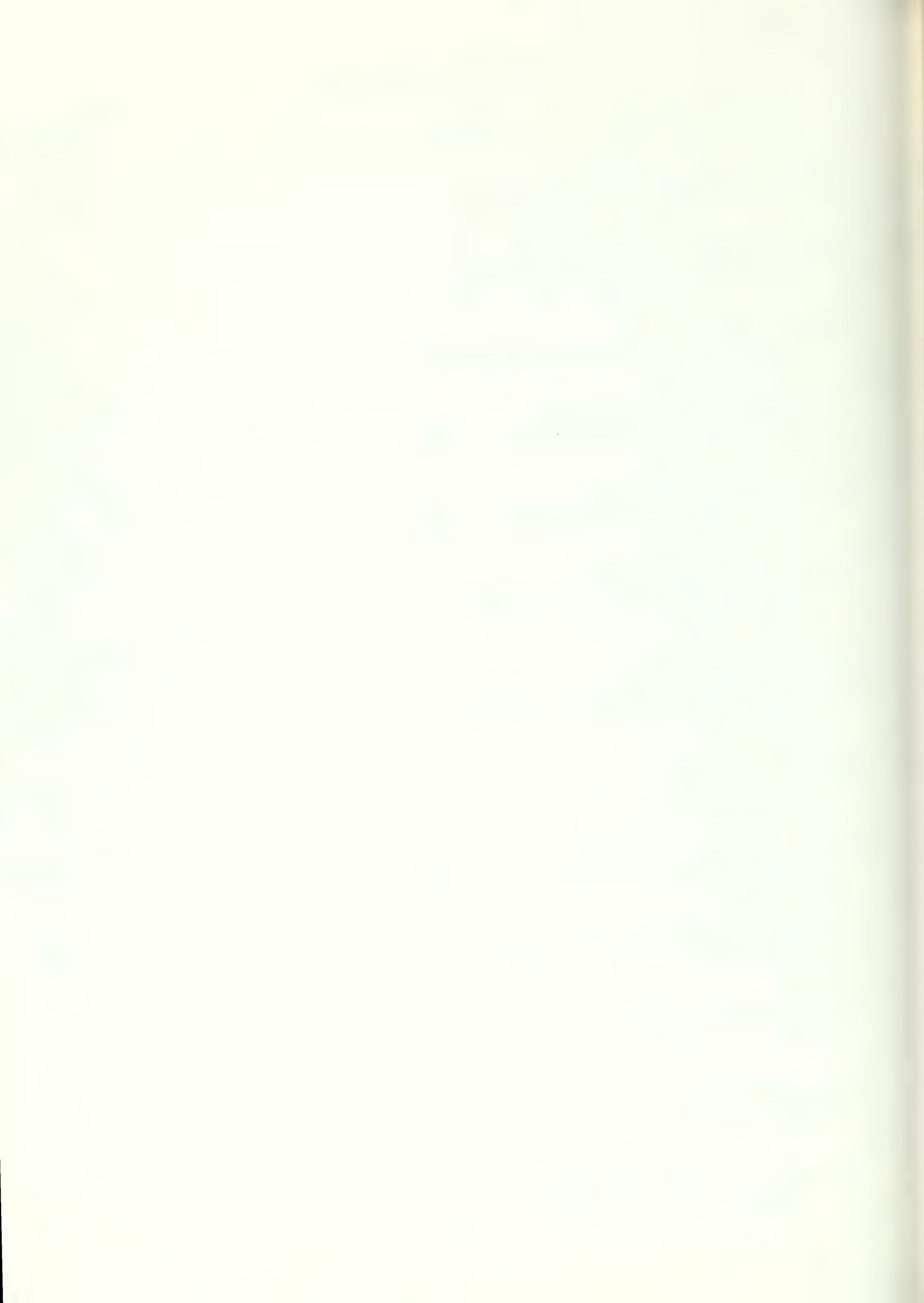
## TOPICAL INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	2
III ERROR SPECIFIED	3
IV STATEMENT OF THE FACTS	3
V ARGUMENT	8
A. FAILURE TO ASK CERTAIN VOIR DIRE QUESTIONS OF THE POTENTIAL JURORS DID NOT CONSTITUTE ERROR	8
B. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S "MOTION" TO SUPPRESS STATEMENTS MADE TO CUSTOMS OFFICIALS PRIOR TO DISCOVERY OF THE CONTRABAND	10
C. THE DENIAL OF THE MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT TO CUSTOMS AGENTS AFTER THE DISCOVERY OF THE NARCOTICS DID NOT CONSTITUTE ERROR	15
D. TESTIMONY BY THE HIGHWAY PATROLMAN WAS PROPERLY RECEIVED IN EVIDENCE	19
E. THE TRAFFIC CITATION WAS PROPERLY RECEIVED IN EVIDENCE	25
VI CONCLUSION	25
CERTIFICATE	26



## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Cotton v. United States, 361 F. 2d 673 (8th Cir. 1966)	22
Diaz-Rosendo v. United States, 364 F. 2d 941 (9th Cir. 1966)	22
FCC v. Schreiber, 329 F. 2d 517, 523 (9th Cir. 1964)	22
Forsberg v. United States, 351 F. 2d 242, 249 (9th Cir. 1965)	24
Good v. United States, 378 F. 2d 934, 936 (9th Cir. 1967)	11
Green v. United States, 282 F. 2d 388 (9th Cir. 1960), cert. denied, 365 U. S. 804	24
Holt v. United States, 342 F. 2d 163 (5th Cir. 1965), cert. denied, 382 U. S. 868	22
Jackson v. Denno, 378 U. S. 368	19
Lipton v. United States, 368 F. 2d 962, 965 (2nd Cir. 1966)	11
Maguire v. United States, No. 22, 223, 9th Cir. 1968	14
Miranda v. Arizona, 384 U. S. 436	10, 11, 12, 13, 14, 16, 18
People v. Mitchell, 209 Cal. App. 2d 312, 318 (1962)	15
Salem v. United States Lines, 370 U. S. 31, 35 (1962), rehearing denied, 370 U. S. 965	23



Sims v. Georgia, 385 U. S. 538	19
United States v. Barra, 149 F. 2d 489, 490 (2nd Cir. 1945)	10, 11
United States v. Davis, 259 F. Supp. 496, 498 (D. C. Mass. 1966)	13, 15
United States v. Jones, 184 Fed. Supp. 329 (D. C. Calif. 1960)	15
United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 238 (1948)	24
Weller v. Dickson, 314 F. 2d 598, 600 (9th Cir. 1963)	22
White v. United States, 315 F. 2d 113, 116 (9th Cir. 1963), cert. denied, 375 U. S. 821	24
Wilson v. United States, 250 F. 2d 312 (9th Cir. 1957), rehearing denied, 254 F. 2d 391	22

### Statutes

Title 18, United States Code, Section 3231	1
Title 21, United States Code, Section 174	1
Title 28, United States Code, Section 1291	1
Title 28, United States Code, Section 1294	1
Federal Rules of Criminal Procedure, Rule 47	10



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MARIA MERCEDES CHAVEZ-MARTINEZ,      )  
  )  
  )  
  Appellant,      )  
  )  
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  )  
  )  
UNITED STATES OF AMERICA,      )  
  )  
  )  
  Appellee.      )  
  )

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.



STATEMENT OF THE CASE

Appellant was charged in a two-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellant knowingly imported and brought 130 ounces of heroin and 20 ounces of cocaine into the United States from Mexico. The second count alleged that appellant knowingly concealed, and facilitated the transportation and concealment of, approximately 130 ounces of heroin and 20 ounces of cocaine, which the defendant knew had been imported and brought into the United States contrary to law.

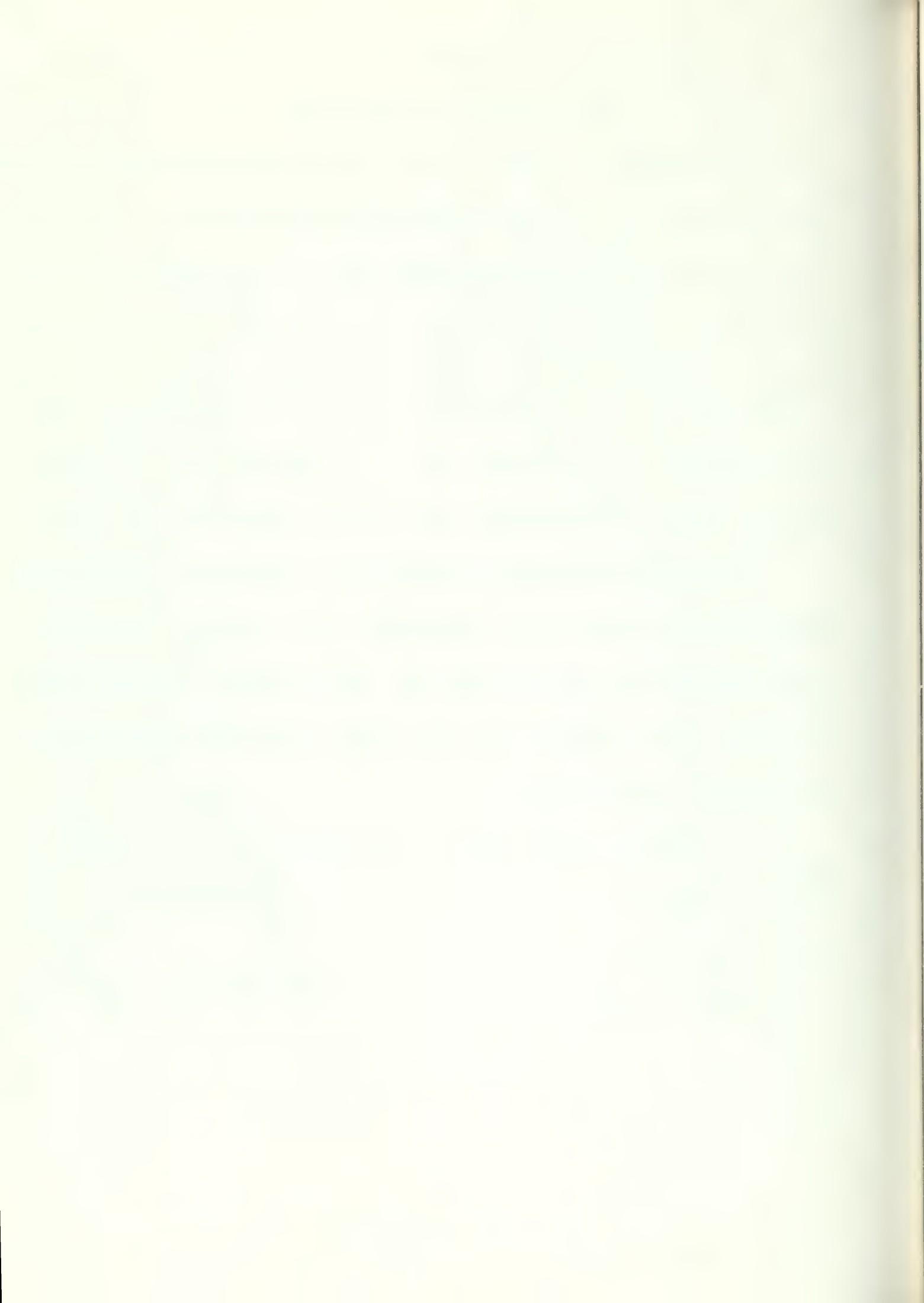
Jury trial of appellant commenced on February 6, 1968, before United States District Judge Fred Kunzel [C. T. 13, 14].<sup>1</sup> Appellant was represented by appointed counsel, Warren Reese, of the Federal Defenders, Inc. Appellant was found guilty as charged in each count on February 7, 1968 [C. T. 12].

On March 5, 1968, appellant was committed to the custody of the Attorney General for imprisonment for a period of 20 years on each count, to be served concurrently [C. T. 17].

Notice of Appeal was filed on March 13, 1968 [C. T. 21].

---

<sup>1</sup> "C. T." refers to the Clerk's Transcript.



### III

#### ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. Alleged error in failure of the trial Court to ask certain voir dire questions of the potential jurors.
2. Alleged error in denying appellant's motion to suppress statements made by appellant before the contraband was discovered.
3. Alleged error in denying appellant's motion to suppress statements made by appellant after the contraband was discovered.
4. Alleged error in admitting into evidence the above described statements.
5. Alleged error in receiving testimony by a Highway Patrol officer.
6. Alleged error in admitting a traffic citation into evidence.

### IV

#### STATEMENT OF THE FACTS

Appellant entered the United States from Mexicali, Mexico, at the Calexico Port of Entry on November 10, 1967 [R. T. 65-66].<sup>2</sup> She was driving a two-door sedan, license number QXR-027. This number was similar to two license numbers on "look-out" at the Port of Entry [R. T. 67].



At the primary inspection point Inspector Harold Patty asked appellant her nationality, citizenship, how far she had travelled into Mexico, and if she had acquired any merchandise or was bringing any merchandise from Mexico. To this last question, appellant replied, "Nothing." [R. T. 68]

Appellant was then asked to open the trunk of the vehicle she was driving. Because appellant did not appear to know which key to use in the lock, Inspector Patty asked her if this was her car. She replied, "No, it belongs to a friend of mine in San Diego." [R. T. 69] This entire conversation was conducted in English [R. T. 70]. At this point, Mr. Patty felt justified in referring appellant to the secondary inspection area [R. T. 69].

At the secondary area she was met by Customs Inspector Knights [R. T. 69-70]. Mr. Knights asked her into the Customs office and asked Chief Inspector Smith to watch her while he (Knights) conducted a search of the automobile [R. T. 73].

Upon reviewing the lookout report, Knights noted that it stated, "heroin in gas tank." [R. T. 73-74]. He then returned to the vehicle and noticed fresh undercoating on the underside of the gas tank. The immediately surrounding area, but no other area of the vehicle, appeared to be freshly undercoated. At this time he also knocked on the underside of the gas tank and noticed that it didn't sound quite right. The automobile was then removed to the rear of the secondary inspection area, out of the lane of traffic [R. T. 74].



Chief Inspector Smith was informed of the findings and placed a call for a Customs Agent, Agent Richenberger [R. T. 74].

While awaiting the arrival of Mr. Richenberger, a conversation occurred between Mr. Knights and appellant [R. T. 75]. The conversation was conducted in English and Spanish, with Mr. Knights' Spanish being described by himself as "fair." [R. T. 84-85]

Mr. Knights, having noticed the name "Lourdes Rodriguez," on the temporary automobile registration certificate, asked appellant "to whom the vehicle belonged." She replied that it belonged to a friend of hers; that the friend's name was Lourdes Rodriguez who lived in the Los Angeles area; that she had met Lourdes a short time before on a street in Tijuana; that she (appellant) had borrowed the vehicle the day before; that she came to Mexicali to meet a friend named Olga; that she didn't know Olga's last name or her address; that at the present time she was going to the Los Angeles area to visit her mother who resided there; and that she was residing with an aunt and uncle at 120 Willow Street, San Ysidro, California [R. T. 76-79]. When Agent Richenberger later asked appellant her address, she replied, "Teniente Cecelia Garcia in Tijuana, Mexico." [R. T. 136] It was later elicited in trial, from testimony by a State of California Highway Patrolman, who had on August 18, 1967, issued appellant a traffic citation in a similar automobile within 10 miles of Calexico, and which automobile was registered to a "Lurds Gutierrez," that she gave the officer a



San Diego address of residence [R. T. 124-128], later found to be non-existent after investigation by a Customs agent [R. T. 129].

At a nearby garage, Customs agents and inspectors witnessed the removal of the gas tank from the automobile driven by appellant [R. T. 80-83]. Upon removal, the tank was found to have a concealed compartment which contained packages amounting to 130 ounces of heroin and 20 ounces of cocaine, the largest seizure of narcotics ever made in the Southern District [C. T. 18]. Stipulations were entered as to the contents and chain of custody of the seized contraband [R. T. 113-115].

Appellant was admonished of her Constitutional rights in English by Customs Agent Quick and then in Spanish by Customs Agent Martin. [R. T. 25-26, 53-54]. The Spanish and English admonitions were found to be substantially identical except that in Spanish the declaration of rights stated that if one cannot obtain an attorney by any other means, one will be assigned to him, and in English it states that if one cannot afford an attorney one will be provided for him [R. T. 52-57]. Appellant told the agents that she understood her rights and would tell them what they wanted to know [R. T. 27, 54, 256-257].

Appellant declined to sign the waiver form, stating that she didn't know what might be put on it after she signed it. She also said, "I'll tell you what you want to know." [R. T. 54] The trial Court determined that a written waiver was not necessary under the Miranda



case [R. T. 48], that the Miranda rule was complied with, and that the appellant understandingly and intelligently waived her right to have counsel present during her interrogation by Customs agents [R. T. 57].

Appellant told Agents Martin and Quick, in reference to the vehicle that she was driving, that she had only seen it the day prior to the date of her arrest. She also said that she borrowed the vehicle from "Lourdes Rodriguez" [R. T. 246-248, 250]. She stated that she owned a 1966 Chevrolet, but had to borrow a vehicle because her automobile was broken down. She later denied that she owned a vehicle [R. T. 254, 256].

Albert Toledo testified that he sold the vehicle in question to appellant for cash, amounting to about \$395. 00; that appellant did not give the Maria Chavez-Martinez name; and that she signed the bill of sale as "Lourdes Rodriguez" [R. T. 67, 97-101].

Roger Boillin testified in regard to the same sale to appellant under the "Lourdes Rodriguez" name. He testified that appellant said that she did not know her address, so the vendor's address was used on the "pink slip." The transaction occurred on October 11, 1967 [R. T. 118-121].

Customs Agent Melvin Moore testified that the value of the heroin in question was approximately \$50,000. 00 in Mexico with the cocaine worth approximately \$12,000. 00 [R. T. 138].

Appellant testified that she was born in Sacramento, had been



living in Tijuana since August, and had lived all of her life in Sacramento, Los Angeles, and Tijuana [R. T. 169-171]. (The address given to Officer Ellis was a San Diego address, R. T. 128). Appellant claimed innocence [R. T. 182-183].

V

ARGUMENT

A. FAILURE TO ASK CERTAIN VOIR DIRE QUESTIONS OF THE POTENTIAL JURORS DID NOT CONSTITUTE ERROR.

---

Appellant complains of the failure of the trial judge, upon request, to ask the following voir dire questions of the potential jurors:

"1. Would the Judge's opinions so conveyed to you influence your ability to form your own opinion on the basis of the evidence and your deliberation in this case?

"2. This case involves an extraordinarily large quantity of narcotic, measurable in pounds. It will be shown that the defendant was the driver and sole occupant of the automobile in which the narcotics were concealed. Knowing this, do you feel that it is impossible that the defendant could be innocent?

"3. Would your attitude be the same if the circumstances just outlined were similar, except that the narcotics concealed in the automobile weighed only one or two ounces?

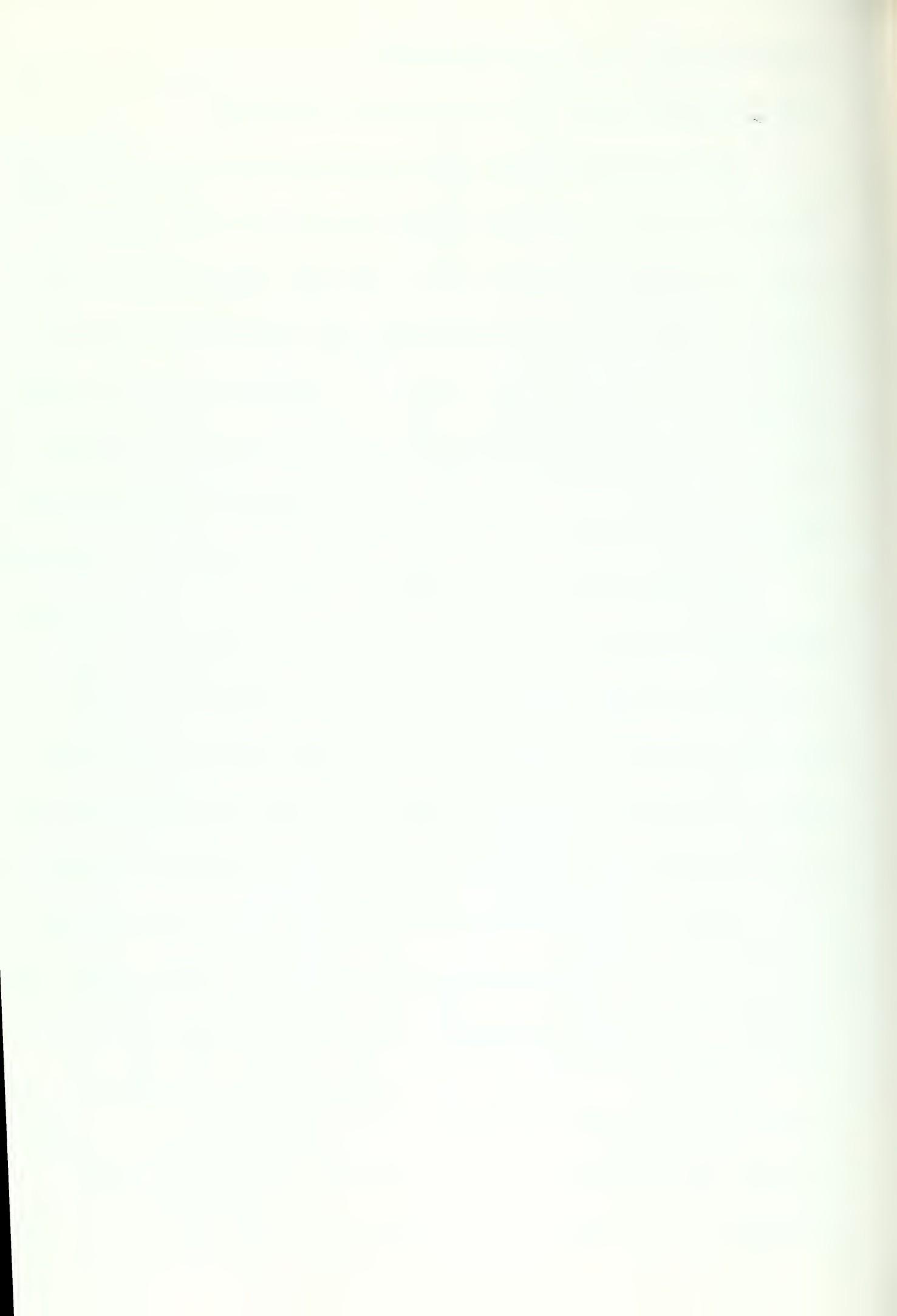
"4. Is there any juror who cannot accept, at the outset, the



proposition that it is possible the defendant did not know the narcotics were concealed in the automobile she was driving?"

The first of the above questions related to the possibility that the potential jurors might have been influenced by a trial judge's criticism of a jury in another case. However, only one member of the entire jury panel in the instant case had been present when the prior jury was criticized [R. T. 10]. In view of this fact, and in view of the fact that the possibility of jury prejudice was covered in the questions by the Court [R. T. 8-10], it is respectfully submitted that the failure to ask the question did not constitute an abuse of discretion.

The other three questions were not proper voir dire questions, because they would tend to provide no information of value in determining the qualifications of the potential jurors, and also because they were confusing and argumentative. These questions related to whether the potential jurors believed that it would be "impossible" for appellant to be innocent, or "possible" for her to have no knowledge of the narcotics, under a certain factual situation. All of the potential jurors would have had to answer the questions in the same manner, as practically anything is theoretically "possible," and few things are "impossible." It is "possible" that appellant thought that she was smuggling Viet Cong explosives rather than narcotics, but the test in a criminal trial is concerned with probabilities, not possibilities or certainties. Furthermore, the questions would have tended to confuse



the jurors in regard to the reasonable doubt rule, which does not require proof to an absolute certainty.

Since the questions were confusing and argumentative, and since the answers would have been known in advance, the trial Court properly declined to expend the time of the Court and litigants in asking these questions.

The questions suggested by appellant are somewhat analogous to the questions involved in United States v. Barra, 149 F. 2d 489, 490 (2nd Cir. 1945), in which the defendant attempted to obtain advance clues in regard to the potential jurors' attitude toward the alleged crime. The Court of Appeals upheld the refusal of the trial Court to ask the questions.

B. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S "MOTION" TO SUPPRESS STATEMENTS MADE TO CUSTOMS OFFICIALS PRIOR TO DISCOVERY OF THE CONTRABAND.

---

Due to failure to comply with Rule 47, Federal Rules of Criminal Procedure, appellant has failed to state a proper motion. Therefore, due to the fact that appellant did not raise an objection when the statements were introduced into evidence, appellant has failed to preserve a right to appeal on this point.

The attempted "motion" [R. T. 58] does not include any reference to statements made to Officer Patty. However, even though an



objection to their admissibility was never made at trial, appellant now on appeal objects to the admissibility of any such statements.

In regard to the statements made to Inspector Knights, appellant objected at one point but presented no evidence. The trial Judge, upon being informed that the statements were made at the border before the arrest, properly denied the motion, no evidence being offered [R. T. 58-59]. If the evidence for appellant supported the motion, such evidence should have been presented. However, when Inspector Knights testified concerning the statements, there was no objection [R. T. 64-69]. This constituted a waiver.

In reference to a statement made by appellant to Officer Patty [R. T. 69], counsel for appellant indicated prior to introduction of the statement: "And that as far as statements go, he asked her if the car was hers and she said, 'No, it belongs to a friend.' That doesn't bother me." [R. T. 15] [Emphasis added.] Furthermore, appellant agreed with the trial Judge that the Miranda warning need not be given to everyone who crosses the border [R. T. 58-59].

A defendant waives objection that a statement had been obtained under circumstances that did not meet Constitutional standards, by failing to object to their introduction at the trial level, and thereby fails to preserve a right to appeal on that point. Good v. United States, 378 F 2d 934, 936 (9th Cir. 1967); Lipton v. United States, 368 F. 2d 962, 965 (2nd Cir. 1966).



Assuming arguendo that appellant has preserved the right to appeal, error was not committed by admitting statements made by appellant to either Patty or Knights.

Appellant was not subjected to "custodial interrogation," which is defined by Miranda v. Arizona, 384 U. S. 436, as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way."

Appellant was not in custody or deprived of her freedom in any significant way. Appellant's contention that Inspector Knights intended to confine appellant is unfounded. (Appellant's Brief, p. 23) The record neither shows that appellant was refused permission to depart, nor that she even desired to leave the Customs office.

Contrary to appellant's contention (Appellant's Brief, p. 23, lines 3-12) many of the "suspicious circumstances" arose after appellant was asked into the Chief Inspector's office. It was not until then that Knight first reviewed the "lookout" report and noticed that it stated, "heroin in gas tank." It was not until Knights further inspected the automobile that he discovered any indication of recent painting of the gas tank [R. T. 73-74]. Therefore, these factors could not have motivated Mr. Knights to ask appellant to accompany him to Chief Inspector Smith's office, because they arose afterwards. Further, "suspicious circumstances" by themselves do not require the Miranda warnings. The sole test as set out by Miranda is whether one is being



"interrogated while in custody or otherwise deprived of his freedom in any significant way."

United States v. Davis, 259 F. Supp. 496, 498 (D. C. Mass. 1966), held that statements made by the defendant, while the defendant was not under arrest but while Customs officials had him under detention, were not subject to exclusion on the grounds that they were elicited by questions unaccompanied by Miranda warnings, during alleged custodial investigation. In Davis, after marihuana had been found on board the boat being searched, Customs officers returned and searched the room of defendant Davis. An investigator found cigarettes in Davis's room. In addition to the statements listed immediately above, Davis also stated how much he had paid for them. During the search Davis was allowed to go to the bathroom only when escorted.

It is appellee's contention that the case at bar is very similar to the Davis case. The facts of the case at bar reflect that appellant was at most only being temporarily detained. In the instant case, appellant's car was being searched and the questions asked of appellant were only those necessary to expedite the matter. They were routine questions. If the Davis rationale is followed, the statements in question here were made while appellant was only being temporarily detained and not in custody or deprived of freedom in any significant way. Therefore, these statements were not subject to exclusion because of an alleged violation of the rule laid down in Miranda.



In Maguire v. United States, No. 22, 223 (9th Cir. 1968), the same question was raised in appellant Maguire's brief as is being raised here: "Was sufficient warning given concerning constitutional rights, before interrogation by the United States Customs Authorities in compliance with the Miranda and Dorado doctrines?" (ROGER C. MAGUIRE, APPELLANT vs. UNITED STATES OF AMERICA, APPELLEE, BRIEF FOR THE APPELLANT, page 6.) Obviously this court considered such a contention frivolous, since the opinion recognizes the facts giving rise to the contention but does not attempt a discussion of the "issue" that was raised. Maguire v. United States, No. 22, 223, pages 2-3, May 28, 1968 (9th Cir. 1968).

The questions were asked of Maguire after he had been referred to the secondary inspection area and without having been given any warnings concerning his Constitutional rights under Miranda. The questions and the responses to them were testified to by Mr. Cardwell. (Id., pages 15-16, 31-32) Appellant Maguire was convicted on one count of violating the Dyer Act (18 USC 2312).

Appellant was not questioned in the interrogation setting as described in Miranda v. Arizona, supra: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." Certainly then, at the border where the Immigration and Customs officers are authorized to stop people and make reasonable inquiries,



objection cannot be made to the statements made in response to the inquiries.

In addition to Davis, supra, other cases have held that a Customs detention does not constitute an arrest.

United States v. Jones, 184 Fed. Supp. 329 (D. C. Calif. 1960);

People v. Mitchell, 209 Cal. App. 2d 312, 318 (1962).

C. THE DENIAL OF THE MOTION TO SUPPRESS STATEMENTS MADE BY APPELLANT TO CUSTOMS AGENTS AFTER THE DISCOVERY OF THE NARCOTICS DID NOT CONSTITUTE ERROR.

---

Appellant contends that statements made by her after the narcotics were discovered by the officers should not have been received in evidence, as the statements allegedly were illegally obtained.

The statements in question were made to Customs Inspector Knights before the narcotics were discovered and to Customs Agents Quick and Martin after the narcotics were discovered [R. T. 74-79, 249-251, 253-254]. The discussion of the statements made to Inspector Knights appears under "B" above, and will not be repeated here.

In regard to the statements made to Agents Quick and Martin, they occurred after appellant had been thoroughly and completely warned of her Constitutional rights. The statements were entirely voluntary.

The gist of appellant's contention is that the result of her



inability to speak English, coupled with an incomplete warning in Spanish, rendered the bi-lingual warning of her Constitutional rights ineffective. Appellant argues that she was significantly deprived of her rights because the Spanish version of her Constitutional rights informed her that she had the right to an attorney and also "the right to have one obtained, to have one appointed for you if you have no other means of obtaining one." [R. T. 33] Thus appellant was given the full Miranda warning in Spanish as well as English [R. T. 33, 53-54].

However, she apparently is contending that her rights under the United States Constitution were violated because the officers did not employ the word, "afford," in one of the two warnings, although the English-language warning was complete, even to the use of the exact word, "afford." [R. T. 25-26, 55-56] Of course, the Spanish-language version was complete, as it merely substituted equivalent language for the verbal ritual favored by appellant.

Assuming, for purposes of argument only, that appellant's Spanish-language warning was not adequate, it is evident that she understood the English-language version.

Appellant, as authority for the premise that she cannot speak English well enough to understand the warnings given in English, cites the alleged difficulty she had conversing with a Highway Patrolman, Inspector Patty, Inspector Knights, Mr. Quick, and the salesman who sold her the automobile.



A review of the testimony of these witnesses demonstrates that appellant's premise is not supported by the facts. Appellant acknowledges that she spoke to Inspector Patty (Appellant's Brief, p. 27) in English, adding that the conversation was brief and simple. The following questions were understood and answered by appellant [R. T. 67-69].

- (1) "What is your nationality?" or "What is your citizenship?"
- (2) How far in Mexico had she traveled.
- (3) Whether she acquired any merchandise or was bringing any merchandise from Mexico.
- (4) Would she open the trunk?
- (5) Is this your car?

The above questions, although brief, would not be simple to someone who had trouble with the English language.

Inspector Knights' interview with appellant [R. T. 76-79] was conducted both in English and Spanish. The record does not reflect which questions were asked in English and which questions were asked in Spanish. However, Inspector Knights did testify that appellant gave responses in English, and those questions that appellant did not seem to understand were asked in Spanish [R. T. 84].

The Highway Patrolman apparently conversed with appellant without any attending difficulty [R. T. 128]. Appellant admits speaking to this officer in English [R. T. 45].



Mr. Donald Quick interrogated appellant in English and received both English and Spanish responses [R. T. 255]. Quick testified that appellant told him that she understood her rights [R. T. 256-257].

Mr. Albert Toledo, a used car salesman, testified that he was able to confer with appellant sufficiently in English to sell her an automobile [R. T. 103]. Appellant was born in Sacramento [R. T. 169].

Independent of any of the above testimony, regarding the ability of appellant to understand English, is the testimony of Mr. Martin, who gave appellant the warning in Spanish. Mr. Martin testified that he heard appellant admit understanding the warnings in English before he gave her the warnings in Spanish [R. T. 249]. Furthermore, Mr. Martin testified that appellant said that she would answer anything because she was innocent and had nothing to hide. Appellant refused to sign the written waiver form, stating that she feared that the government would tamper with the signed instrument, and her refusal was not an indication that she did not desire to waive her rights [R. T. 249].

One could only conclude from the evidence supplied by the above witnesses, viewed on appeal in the light most favorable to the government, that appellant understood the English-language warning of her Constitutional rights.

In considering appellant's Miranda objection, it should be noted that there is a strong public policy against suppression of the truth by



barring a voluntary statement merely because a particular verbal ritual has not been followed by the officers. This public policy is indicated by the actions of the nation's highest law-making body in passing the Crime Control Act.

Appellant implies that certain special procedures outlined in Jackson v. Denno, 378 U. S. 368, and Sims v. Georgia, 385 U. S. 538, should have been followed in the instant case. However, Jackson, Sims, and related cases have no application here, because those cases involve procedures for determining voluntariness of a defendant's statements. Appellant did not raise an issue of voluntariness of her statements in the trial Court, so there was neither a request nor a justification for resort to the procedures outlined in Jackson and Sims.

---

D. TESTIMONY BY THE HIGHWAY PATROLMAN  
WAS PROPERLY RECEIVED IN EVIDENCE.

---

Appellant contends that the testimony by Officer Ellis, relating to the "Lurds Gutierrez" matter, was not admissible in evidence.

However, this testimony was clearly admissible for the purpose of tending to show that appellant falsified to Inspector Knights when questioned in regard to the instant case. She had provided Inspector Knights with the old "evil missing man" defense (in this case, the evil missing woman, "Lourdes Rodriguez"), claiming that she met "Lourdes Rodriguez" in the street and borrowed the vehicle from her [R. T. 75-76].



Appellant's use of a vehicle in the name of "Lourdes Gutierrez," or "Lurds Gutierrez" (apparently the spelling of the first name depended upon the officer's guess, R. T. 125-126, 145-146), was highly material, in view of the very unusual first name and the similarity of the "Gutierrez" and "Rodriguez" names, both nine-letter names ending in "e-z."

The evidence was admissible for other purposes also. In considering appellant's contention, it is helpful to review the facts as they were presented in trial. Testimony concerning a traffic citation issued less than three months prior to appellant's arrest for the crime and conviction herein being appealed, was admitted on condition that if the relevancy of it was not later made clear, the defendant could make a motion to strike the testimony [R. T. 124-127].

The facts and circumstances found by the trial Court to be sufficient to support the admission of the traffic citation into evidence were as follows: Officer Ellis testified that he cited appellant for a traffic violation on August 18, 1967 [R. T. 124-128]. Additional testimony by an investigating Customs agent demonstrated that appellant gave the citing Highway Patrolman a non-existent address [R. T. 128-130]. Other testimony by the Highway Patrolman was to the effect that the automobile appellant was driving at the time he cited her was registered to a "Lurds" or "Lourdes Gutierrez" [R. T. 125-126, 145-146]. Evidence was adduced that appellant also gave a false address



to the Border Patrol officers when she was arrested November 10, 1967, for the offense herein being appealed [R. T. 77-79, 92-93]. Documents indicating the automobile appellant was driving on November 10, 1967, was registered to a "Lourdes" Rodriguez, were admitted into evidence [R. T. 143-149]. Testimony that appellant purchased this vehicle using the name, "Lourdes" Rodriguez, and giving no address at all to the dealer for her residence, was also admitted into evidence [R. T. 97-102].

One further element, considered by the Court, was the theory of the Government as to the relevance of the circumstances under which the citation of August 18, 1967, was issued. The theory was this: Although the vehicles were manufactured in different years, the fact that they were both the same make of automobiles (the one driven on August 18, 1967, being a 1961 Plymouth and the one driven by appellant when arrested for this offense being a 1959 Plymouth), so the same gas tank might have been used in several different models and years of the same make automobile.

These are the facts and circumstances used by the Court in making a determination as to whether or not to admit the evidence as to the prior traffic citation: the similar and unusual first names used in the registrations of the automobiles driven by appellant at the time she received the traffic citation and at the time she was arrested for the offense being appealed; the false address given to the Highway



Patrolman; no address at all being given to the automobile dealer; and another false address given to the officers at the time of her arrest.

The facts in the instant case are distinguishable from the factual situation in the case cited in appellant's sole authority, Diaz-Rosendo v. United States, 364 F. 2d 941 (9th Cir. 1966). Furthermore, Diaz-Rosendo does not discuss the numerous exceptions to the general rule.

In addition, in the instant case, the evidence of appellant's statements to Officer Ellis was not being offered to prove the commission of the crime set forth in this indictment by the use of separate and distinct crimes not included in this indictment.

That the trial Judge possesses wide latitude in the determination of the relevancy or materiality of evidence, and that his ruling will not be reversed in the absence of an abuse of discretion, is well settled in this and other jurisdictions.

Wilson v. United States, 250 F. 2d 312 (9th Cir. 1957), reh. den., 254 F. 2d 391;

Holt v. United States, 342 F. 2d 163 (5th Cir. 1965), cert. den., 382 U. S. 868;

Cotton v. United States, 361 F. 2d 673 (8th Cir. 1966).

As to what constitutes an abuse of discretion, this Court set forth in Weller v. Dickson, 314 F. 2d 598, 600 (9th Cir. 1963), and later used as authority in FCC v. Schreiber, 329 F. 2d 517, 523 (9th



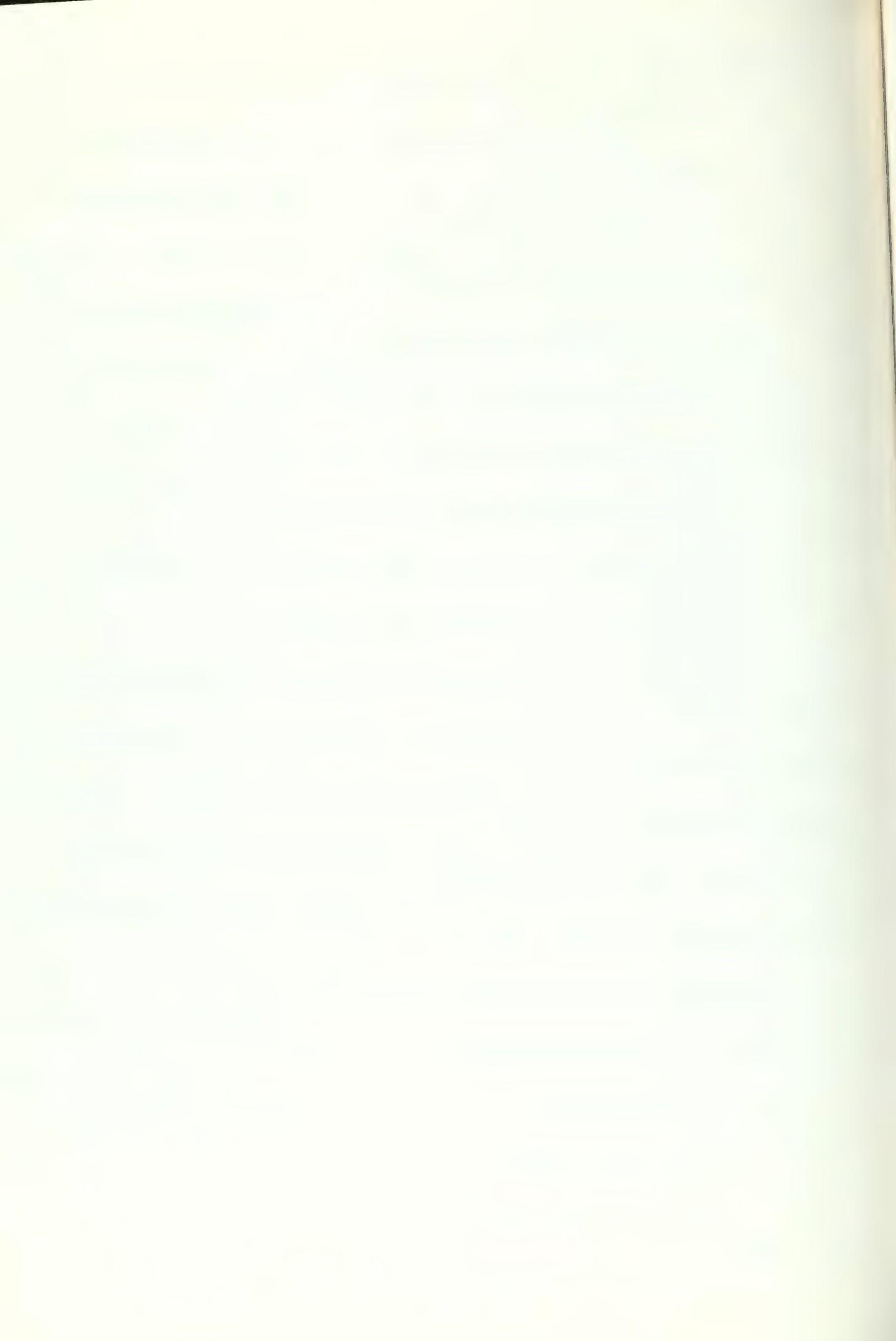
Cir. 1964), the following definition:

"There is no exact measure of what constitutes an abuse of discretion. It is more than the substitution of the judgment of one tribunal for that of another. Judicial discretion is governed by the situation and circumstances of each individual case. Even where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion that is not justifiable in view of such situation and circumstances." [Emphasis added]

The Supreme Court has held that the "trial judge has broad discretion in the matter of admission or exclusion of . . . evidence and his action is to be sustained unless manifestly erroneous." Salem v. United States Lines, 370 U. S. 31, 35 (1962), rehearing denied, 370 U. S. 965, (this part of decision affirmed, case reversed and remanded on other grounds. For remand see 304 F. 2d 672).

Appellant complains that the prosecuting attorney allegedly presented some improper arguments to the jury. However, there was no objection at the time [R. T. 268-269, 313], so there is nothing of which to complain upon appeal.

"Counsel for defense cannot as a rule remain silent, interpose no objections, and after a verdict has



been returned seize for the first time on the point that the comments to the jury were improper or prejudicial."

Forsberg v. United States, 351 F. 2d 242, 249 (9th Cir. 1965); United States v. Socony-Vacuum Oil Co., 310 U. S. 150, 238 (1948).

This court said further in the same opinion:

"Appellant also claims error in counsel's . . . argument . . . (T)hese remarks were made without objection by appellant. As this court said in Orebo v. United States, 9 Cir. 1961, 293 F. 2d 747, 749, 'This type of error would be easily correctible by the trial court upon seasonable objection'."

Where the conduct or argument of opposing counsel is improper, the procedure on the part of the defendant is to promptly object and request from the Court an instruction to the jury to disregard the statement.

The final argument in a case may contain, and counsel are permitted to argue, all reasonable inferences that can be drawn from the evidence adduced. Green v. United States, 282 F. 2d 388 (9th Cir. 1960), cert. denied, 365 U. S. 804. In further support of this statement of the law, this Court held in White v. United States, 315 F. 2d 113, 116 (9th Cir. 1963), cert. denied, 375 U. S. 821:

"(E)ven had there been a taint of unfairness or prejudice, no voice was raised in protest - no objection ever raised -



no chance given the trial court to cure any alleged error. This is a complete waiver."

**E. THE TRAFFIC CITATION WAS PROPERLY RECEIVED IN EVIDENCE.**

---

It does not appear that the traffic citation in question added anything of importance to the oral testimony already received. As the oral testimony was properly received is evidence (as discussed under "D" above), the traffic citation was admissible to supplement the testimony that was already in the record.

VI

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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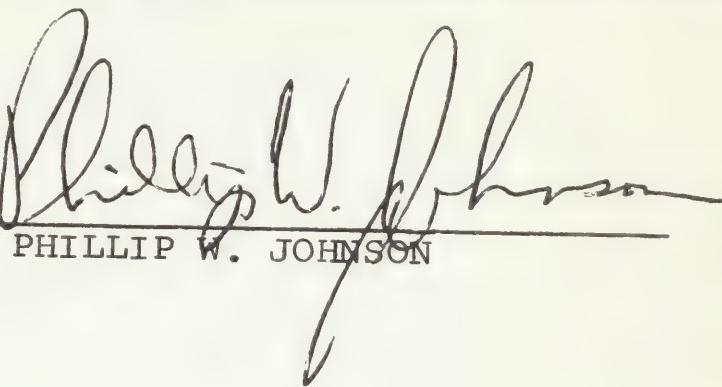
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



---

PHILLIP W. JOHNSON



1 No. 22784

2 IN THE UNITED STATES COURT OF APPEALS  
3 FOR THE NINTH CIRCUIT

5 DENNIS FRAZIER,

6 Appellant,

7 vs.

8 UNITED STATES OF AMERICA,

9 APPELLEE.

FILED

MAY 8 1968

WM. B. LUCK, CLERK

11 APPEAL FROM THE UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 -----  
16 APPELLANT'S OPENING BRIEF

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vs.  
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TOPICAL INDEX

	<u>page</u>
1 TABLE OF AUTHORITIES	ii
2 STATEMENT OF JURISDICTIONAL FACTS	1
3 STATEMENT OF THE CASE	2
4 QUESTIONS INVOLVED	4
5 RESUME OF PERTINENT EVIDENCE	5
6 SPECIFICATION OF ERRORS	14
7 SUMMARY OF ARGUMENT	15
8 ARGUMENT	
9	
10 I Appellant's privilege against self	
11 incrimination guaranteed by the Fifth	
12 Amendment was violated by reason of his	
13 conviction for failure to comply with the	
14 requirements of the Marihuana Tax System.	20
15 II The conviction of appellant was obtained	
16 by impermissible entrapment as a matter of	
17 law in violation of the due process clause	
18 of the Fifth Amendment to the Constitution	
19 of the United States.	27
20 III The trial court committed plain error when	
21 it gave misleading and prejudicially erroneous	
22 instructions to the jury as to the quantum of	
23 proof of the defense of illegal entrapment.	
24 Further, whether the police conduct fell below	
25 standards, and thus was an improper use of	
26 government power, and is a question for the	
27 court, and not the jury, and submission of	
28 the question to the jury resulted in appellant	
being deprived of his liberty without	
due process of law.	43
IV The unreasonable delay between the offense	
and the arrest prejudiced appellant's ability	
to defend himself and was a violation of due	
process thus violating rights guaranteed by	
the Fifth Amendment.	49
CONCLUSION	55
CERTIFICATION AND PROOF OF SERVICE	57
EXHIBITS	iv
APPENDIX	v



TABLE OF AUTHORITIES

Cases

pages

3	ALBERTSON V. SUBVERSIVE ACTIVITIES CONTROL BOARD 182 US 70, 15 L Ed 2d 165, 86 S Ct 194 (1965)	15-24
4	BUTTS V. UNITED STATES, CA8th, 1921, 273 F. 38	30
6	GROSSO V. UNITED STATES, <u>US</u> , 19 L Ed 2d 906, 88 S Ct <u>  </u> (1968)	15-24-25-26-27
8	HAYNES V. UNITED STATES, <u>US</u> , 19 L Ed 2d 923, 88 S Ct <u>  </u> (1968)	15-24
9	McNABB V. UNITED STATES, 318 US 332, 63 S Ct 608, 87 L Ed 819, (1943)	46-47
11	MARCHETTI V. UNITED STATES, <u>US</u> , 19 L Ed 2d 889, 88 S Ct <u>  </u> , (1968)	15-24
12	MASCIALE V. UNITED STATES, 356 US 386, 2 L Ed 2d 859, 78 S Ct 827	47
14	MATYSEK V. UNITED STATES, CA9th, 1963, 321 F.2d 246	31-41-42
16	NEWMAN V. UNITED STATES, CA4th, 1964, 299 Fed. 131	30-31
17	NEWSOM V. UNITED STATES, CA5th, 1964, 335 F.2d 237	33
19	NOTARO V. UNITED STATES, CA9th, 1966, 363 F.2d 169	17-44-45
20	ROBISON V. UNITED STATES, CA9th, 1967, 379 F.2d 338	17-18-45-46-47-49
21	ROSS V. UNITED STATES, CDC, 1965, 349 F.2d 210	19-50-53
23	SHERMAN V. UNITED STATES, 356 US 369, 2 L Ed 2d 848, 78 S Ct 819, (1958)	16-31-32-47
25	SORRELLS V. UNITED STATES, 287 US 435, 53 S Ct 210, 77 L Ed 413, 86 ALR 249 (1932)	28-29-30-31-41-42
26	UNITED STATES V. PUGLIESE, CA2d, 1965, 379 F.2d 338	45



1	WHITING V. UNITED STATES, CA1st, 1963, 321 F.2d 72	
2	WOO WAI V. UNITED STATES, CA9th, 1915, 223 F. 412	27-28
4	WOODY V. UNITED STATES, CDC, 1966 370 F.2d 214	50-51-53-54
5		

6                   STATUTES

7	18 United States Code Sec.3231	1
8	21 United States Code Sec.176(a)	1-2
9	26 United States Code Sec.4741 through 4775	-20-15-2-1
10		22-21-
11	28 United States Code Sec.1254(3)	47-49
12	28 United States Code Sec.1291	2
13		

14                   RULES AND REGULATIONS

15	Fed. Rules of Crim.Proc.:	
16	Rule 29	3
	Rule 48(b)	49
17	Federal Tax Regulations:	22
18	#152.66 (Form 679a Marihuana)	
19	#152.69	
	#152.62	
20	- - - - -	
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

— — — — —

DENNIS FRAZIER,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

APPELLANT'S OPENING BRIEF

TO THE CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT, AND TO THE ASSOCIATE JUSTICES  
THEREOF, AND TO EACH OF THEM:

## STATEMENT OF JURISDICTIONAL FACTS

The indictment herein charged violations of Title 21, United States Code, Section 176(a) and Title 26, United States Code, Section 4742(a), in three counts, offenses against the United States.

Under Title 18, United States Code, Section 3231,  
the United States District Court had original jurisdiction.

Upon the jury's verdict of guilty, appellant was sentenced.

It is conceded that this court has jurisdiction



1 over appeals from such final decisions of a district court  
2 under the provisions of Title 28, United States Code,  
3 Section 1291.

4 - - - - -  
5  
6 STATEMENT OF THE CASE  
7

8 The indictment charged one transaction involv-  
9 ing three counts, on or about June 28, 1967, in Los  
10 Angeles County within the Central District of California.  
11

12 Count One charged appellant with a violation of  
13 Title 21 United States Code Section 176(a),<sup>1/</sup> (receiving,  
14 concealing, and facilitating the transportation and con-  
cealment of 4,025.700 grams of Marihuana). (R.2)<sup>2/</sup>

15 Count Two charged a further violation of Section  
16 176(a), (selling to Agent Roger Knapp said Marihuana). (R.3)

17 Count Three charged appellant with a violation of  
18 Title 26 United States Code Section 4742(a), (transferring  
19 said Marihuana without obtaining the U.S.Treasury order  
20 form). (R.4 )  
21 - - - - -

22 1/ Statutes, Rules, Texts and Instructions, or pertinent  
23 parts thereof, not otherwise quoted in the body of the  
24 brief, the Record on Appeal, or the Transcript of Testi-  
25 mony, are set out in the Appendix attached.

26 2/ "R" as used herein refers to the Record on Appeal.

"T" as used herein refers to the Transcript of Testimony of  
the proceedings of December 5-6, 1967 and January 8, 1968.



1 Appellant was arraigned on the indictment October

2 23, 1967, and plead not guilty. (R.5)

3 On December 5, 1967, before the Honorable Irving  
4 Hill, United States District Judge, jury trial commenced.  
5 (R.15)

6 On December 6, 1967, appellant was found guilty  
7 as charged in the indictment. (R.16)

8 Appellant made a motion for judgment of acquittal  
9 notwithstanding the jury verdict, under Rule 29, Federal  
10 Rules of Criminal Procedure. The motion was denied. (R.16)

11 On January 8, 1968, appellant was sentenced to  
12 imprisonment for a term of five years. (R.18)

13 Bond on appeal was set at \$2,000 personal surety.  
14 (R.18)

15 Notice of appeal was filed on January 15, 1968.

16 (R.20)

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## QUESTIONS INVOLVED

- I. Are the requirements of the Marihuana Tax System part of an interrelated statutory system for taxing illegal transfers of marihuana, and is an obvious purpose of this statutory system to coerce evidence from persons engaged in illegal activities for use in their prosecution?

Would the requirements have provided information incriminating to appellant had he complied therewith thus violating his constitutional privilege against self-incrimination, and, if it would have done so, would appellant have been otherwise prevented from asserting the constitutional privilege?

- II. Does the evidence show, as a matter of law, that the appellant was the victim of impermissible entrapment?
  - III. Were the appellant's rights prejudiced when the Trial Court gave confusing and misleading instructions to the jury as to the quantum of proof required to establish illegal entrapment?

Is the question of police conduct falling below standards, and thus an improper use of government power, one for the court or the jury, and if for the court, was appellant deprived of his liberty without due process?



1 IV. Was the delay in apprising appellant of the charges  
2 against him unreasonable and prejudicial in its  
3 effect on his ability to defend himself against the  
4 charges, and was this delay so oppressive as to  
5 constitute a denial of due process?

6 - - - - -  
7

8 RESUME OF PERTINENT EVIDENCE  
9

10 ROGER KNAPP, United States Treasury Agent, Federal  
11 Bureau of Narcotics, testified for the Government that  
12 on or about the evening of June 10, 1967, he met appell-  
13 lant at a social gathering at appellant's residence, and  
14 that during the evening he talked briefly with appellant.

15 (T.52-53) The prosecutor asked Agent Knapp:

16 "Q. When you talked with Mr. Frazier  
17 who else was present that, say, was part of  
18 the conversation or might have heard what  
19 was said?

20 A. A Mr. Craig Lasha." (T.53)

21 Agent Knapp testified further:

22 "A. There was a brief conversation. In  
23 essence, I asked Mr. Frazier if he could  
24 purchase some narcotics for me. He claimed  
25 he could. I then asked for his telephone  
number.....I told him I would contact him  
later." (T.54) (EMPHASIS OURS THROUGHOUT RESUME)



1           Further testimony from Agent Knapp:

2           "A. On June the 26th I made a telephone call" .. (T.55)  
3           (established that it was appellant)

4           Then I asked him if I could purchase about  
5           5 kilograms of marijuana from him. He said  
6           he thought he could get them, but he would  
7           have to make a few phone calls. We then agreed  
8           that I would call him back on the 28th to make  
9           more definite arrangements. (T.55)

10          Q. Did you then, on the 28th, call back Mr.  
11          Frazier?

12          A. Yes, I did." (T.55)

13          (established it was appellant)

14          "A. I then asked him if I could purchase the  
15          marijuana from him tonight. He said it was  
16          ready. And then we agreed that I should drive  
17          to his residence...."

18          (continuing)

19          A....I drove to his residence...

20          (continuing)

21          A....we had a brief conversation through  
22          the passenger side window of my car.

23          Q. Was there anyone else present beside  
24          yourself and Mr. Frazier?

25          A. No, there wasn't." (T.56)

26          The testimony continued, stating that after a



1 half hour at the residence, appellant and Agent Knapp  
2 drove in appellant's car to an intersection and parked;  
3 that appellant walked out of sight; that a few minutes  
4 later he returned, and in Agent Knapp's own words;

5 "And he said that the source of supply  
6 did not want to meet me." (T.57)

7 Knapp testified that during the conversation, a  
8 Young Male Negro (hereinafter also referred to as Mister X)  
9 walked past, got into the driver's seat of a blue car  
10 parked in front of them. (T.57) Knapp stated:

11 "I gave (Frazier) \$520 of previously  
12 recorded Government money." (T.58)

13 Agent Knapp testified that appellant got in the  
14 passenger side of the blue car with Mister X and drove out  
15 of sight, later returning; appellant got out of the car  
16 carrying a brown bag which he put behind the seat of his  
17 own car, got in, and drove back to his residence. (T.58-59)  
18 Knapp stated:

19 "I inspected the contents of the bag..."

20 "I then took the bag out of the car and walked  
21 across the street and put it in the Government  
22 car...and locked the car."

23 "Mr. Frazier and I then went into his house.  
24 And we discussed the possibility of my pur-  
25 chasing approximately forty or more kilograms  
26 of marijuana from him at a future date." (T.59)



1 Objection by defense counsel that "purchase at a  
2 future date" was not within the indictment was overruled  
3 by the Court.."contemporaneous transaction".."part of  
4 the res gestae." (T.59) Then the Court asked Agent Knapp:

5 "Who else was present inside the house  
6 during this conversation?

7 WITNESS: I don't believe anyone was,  
8 Your Honor." (T.59-60)

9 The prosecutor then queried Agent Knapp:

10 "Q. Was there any other mention regarding  
11 the transaction that had just been completed?

12 A. Only that he complained that he hadn't made  
13 enough out of the transaction to justify his  
14 traveling all the way down there. And he  
15 stated that he was rather unhappy with the  
16 amount that he received." (T.60)

17 After introduction of the evidence, which by  
18 stipulation earlier (T.51) established that the five  
19 bricks of leafy material in question were identified as  
20 marijuana, the prosecutor asked the Agent:

21 "Q. Mr. Knapp, directing your attention  
22 once again to the transaction in question  
23 on the evening of the 28th, was there ever  
24 a mention or a request from Mr. Frazier for  
25 an order from you as required by the Secretary  
26 of the Treasury? I guess it is referred to



1 as a marihuana demand form.

2 A. No, there wasn't.

3 (Objection to leading the witness overruled)

4 Q. At any other time was this ever requested  
5 from Mr. Frazier?

6 A. No, it wasn't." (T.63-64)

7 - - - -

8 On cross-examination, Agent Knapp's testimony  
9 established that on June 10th, he met appellant for the  
10 first time, that he was introduced by Craig Lasha, that  
11 Craig Lasha had brought Agent Knapp to appellant's  
12 residence (T.66), that Knapp had met Lasha previously,  
13 and when asked if Lasha were an informer, and the prose-  
14 cutor objected, the Court overruled the objection and  
15 asked Agent Knapp:

16 "What was Mr. Lasha's capacity, to the best  
17 of your knowledge?

18 WITNESS: He was cooperating with the Bureau  
19 of Narcotics.

20 COURT: But was not being paid for that  
21 service?

22 WITNESS: Not that I know of, Your Honor." (T.67)

23 Whereupon defense counsel requested that the  
24 informer, Craig Lasha, be brought into Court for con-  
25 frontation. The Court, outside the hearing of the jury,  
26 and after a thorough inquiry, ordered that, if possible,



1 Mr. Lasha be brought in.

2           The cross-examination of Agent Knapp continued in  
3 open court within the hearing of the jury. Defense counsel  
4 queried Agent Knapp:

5 "Q. Isn't it true, Mr. Knapp, that you  
6 told Mr. Frazier that your car was mal-  
7 functioning and that you had better use  
8 his car?

9 A. I may have. I don't recall." (T.74)

10          Defense counsel asked Knapp if he arrested the  
11 appellant, Knapp stating that he did.

12 "Q. And what date did you arrest him?

13 A. This was on September the 13th."

14 "Q. And the purchase happened on June the  
15 28th, 1967?

16 A. That is correct." (T.75)

17          Defense counsel made a motion to dismiss because  
18 of the delay between the offense and the arrest, which  
19 was denied by the court. (T.76)

20          Defense counsel asked Agent Knapp if he knew to  
21 whom the blue car, driven by Mister X, belonged, to  
22 which Knapp replied:

23 "I believe inquiries were made. I don't  
24 recall the results.

25 Q. Would it refresh your memory if you  
26 could look at the report that you made out



1 at the time of the events?

2 A. Possibly.

3 DEFENSE COUNSEL: Your Honor, may I ask the  
4 United States Attorney now to show Mr. Knapp  
5 the particular report which is in his files?

6 (Court query)

7 PROSECUTOR: The agents' reports are here,  
8 Your Honor.

9 COURT: Very well. Turn them over, pursuant  
10 to the Jencks Act." (T.78)

11 (After reading the report, Agent Knapp's cross-  
12 examination resumed.)

13 "Q. And it belonged to whom?

14 A. I believe it said there Cynthia  
15 Hester. It is difficult to read."

16 "Q. Did you find out who the young  
17 Negro male was?

18 A. No, I didn't." (T.78)

19 - - - - -

20 On re-direct, the prosecutor queried Agent Knapp  
21 again as to why the Agent remained alone in the car, why  
22 he didn't go along? And again Agent Knapp answered:

23 "A. Mr. Frazier told me that the unidentified  
24 male did not want to meet me." (T.82)

25 - - - - -



1 CHARLES R. HENRY, United States Treasury Agent,  
2 Federal Bureau of Narcotics, testified that he was one  
3 of several surveillance agents who followed Agent Knapp  
4 to appellant's residence on June 28, 1967. (T.87)

5 Agent Henry testified that he saw Knapp and the  
6 appellant go into appellant's residence, come out later,  
7 drive off together in appellant's car; that he saw them  
8 park at an intersection, that he saw appellant go into  
9 an apartment complex; that he later saw appellant in  
10 apparent conversation with Knapp; a blue car was parked  
11 in front of appellant's; that he saw appellant get into  
12 the blue car with an unidentified person, Negro male,  
13 and they drove away. (T.88-89)

14 He further testified that the pair returned; that  
15 he observed appellant get out of the car with a paper bag,  
16 return to his own car, place the bag in the car, then he  
17 got in with Knapp and returned to the residence; that he  
18 observed Knapp and appellant go into the residence, and  
19 later Knapp came out, got into the government car, and  
20 met with the surveillance agents. (T.90-91)

21 - - - - -

22 On cross-examination, Agent Henry was queried as  
23 to appellant's walking to a nearby gas station to pick up  
24 a tire for his car, and after the Court intervened, Agent  
25 Henry was able to recall that he did observe the appellant  
26 pick up a tire. (T.92-93)



1           Queried as to the young male Negro, Agent Henry  
2 testified that he saw him, that he did not know who he  
3 was. (T.94-95) When asked by defense counsel if he tried  
4 to find out the identify of this specific Negro male,  
5 Agent Henry stated:

6           "A. In the normal procedures of investigation  
7 we attempt to identify those persons we have  
8 reason to believe were involved, sir.

9           Q. Is your answer yes or no?

10          A. Yes, sir.

11          Q. Could you state to us who he was?

12          A. No, sir.

13          Q. You mean you don't now remember that  
14 name anymore?

15          A. I never found out the name, sir." (T.96)

16                 - - - - -

17           Out of the presence of the jury, the United States  
18 Attorney stated that the informer, Craig Lasha, was ready  
19 and waiting, but the Government refused to put him on as  
20 its witness; with defense counsel refusing to make Lasha  
21 his witness, Lasha did not testify. (T.99)

22           Defense counsel then brought in the defense of  
23 entrapment. (T.105)

24           The appellant did not testify, nor did he  
25 produce any witnesses.

26                 - - - - -



1                   SPECIFICATION OF ERRORS

2                   I

3                   Appellant's privilege against self-incrimination  
4                   guaranteed by the Fifth Amendment to the Constitution  
5                   of the United States was violated by reason of his  
6                   conviction for failure to comply with the requirements  
7                   of the Marihuana Tax system.

8                   II

9                   Appellant's conviction was obtained by impermissible  
10                  entrapment as a matter of law in violation of the Due  
11                  Process Clause of the Fifth Amendment to the Constitution  
12                  of the United States.

13                  III

14                  The Trial Court committed plain error when it  
15                  gave misleading and prejudicially erroneous instructions  
16                  to the jury as to the quantum of proof of the defense  
17                  of illegal entrapment. Further, whether the police  
18                  conduct fell below standards and thus was an improper  
19                  use of government power, is a question for the court,  
20                  and not the jury, and submission of the question to the  
21                  jury resulted in appellant being deprived of his liberty  
22                  without due process of law.

23                  IV

24                  The unreasonable delay between the offense and  
25                  the arrest prejudiced appellant's ability to defend  
26                  himself thus violating the Due Process Clause of the  
                      Fifth Amendment to the Constitution of the United States.



1                   SUMMARY OF ARGUMENT

2                   I

3                   The appellant is asserting a proper claim of the  
4 privilege against self-incrimination which precludes his  
5 criminal conviction premised on a failure to comply with  
6 the requirements of the Marihuana Tax System under Title  
7 26 United States Code, Sections 4741 through 4775.

8                   As discussed hereinafter under Argument (I),  
9 it would be inappropriate for this Court to permit con-  
10 tinued enforcement of an interrelated tax system, the  
11 requirements of which must necessarily result in coerc-  
12 ing evidence from persons engaged in illegal activities  
13 for use in their prosecution.

14                  This Honorable Court should apply the principles  
15 of the very recent decisions of the United States Supreme  
16 Court, decided January 29, 1968, in

17                  MARCHETTI V. UNITED STATES, \_\_\_\_US\_\_\_\_,

18                  19 L Ed 2d 889, 88 S Ct \_\_\_\_ (1968)

19                  GROSSO V. UNITED STATES, \_\_\_\_US\_\_\_\_,

20                  19 L Ed 2d 906, 88 S Ct \_\_\_\_ (1968)

21                  HAYNES V. UNITED STATES, \_\_\_\_US\_\_\_\_,

22                  19 L Ed 2d 923, 88 S Ct \_\_\_\_ (1968)

23 consistent with its decision in

24                  ALBERTSON V. SUBVERSIVE ACTIVITIES CONTROL BOARD

25                  382 US 70, 15 L Ed 2d 165, 86 S Ct 194 (1965)

26 and reverse the conviction and judgment appealed from,



1 remand the case to the United States District Court for  
2 the Central District of California with directions to  
3 quash the indictment and discharge the defendant.

4 II

5 The evidence shows as a matter of law that ap-  
6 pellant was a victim of unlawful entrapment, and a con-  
7 viction so obtained is in violation of the Due Process  
8 Clause of the Fifth Amendment to the Constitution of the  
9 United States.

10 The principles to be followed have been establish-  
11 ed by cases cited under Argument (II) hereinafter set  
12 forth, including the United States Supreme Court decision in

13 SHERMAN V. UNITED STATES, 356 US 369,  
14 2 L Ed 2d 848, 78 S Ct 819 (1958)

15 which found the criminal conduct charged against the  
16 defendant was the product of the creative activity of law  
17 enforcement officials; the Court reversed the judgment,  
18 and remanded the case to the District Court with instruc-  
19 tions to dismiss the indictment.

20 III

21 The Trial Court committed plain error when it  
22 gave misleading and prejudicially erroneous instructions  
23 to the jury as to the quantum of proof of the defense of  
24 illegal entrapment. Further, whether the police conduct  
25 fell below standards, and was thus an improper use of  
26 government power, is a question for the court, and not



1 the jury, and submission of the question to the jury  
2 resulted in appellant being deprived of his liberty  
3 without due process of law.

4 The instructions taken as a whole (and particular-  
5 ly on entrapment, set forth in totidem verbis under  
6 Argument (III) hereinafter), and even though the instruc-  
7 tions supposedly were taken directly from

8 NOTARO V. UNITED STATES, CA 9th, 1966  
9 363 F.2d 169

10 nevertheless erroneously imposed requirements which  
11 brought about the reversal of NOTARO in the Ninth Cir-  
12 cuit decision, stating that it was reasonably probable  
13 that the jurors were confused by the instructions, that,  
14 even though the jury was properly informed, in a general  
15 instruction, as to the burden of proof which rested upon  
16 the prosecution, nonetheless the possibility that there  
17 was confusion or misunderstanding was strengthened, not  
18 eliminated, by a view of the instructions as a whole.

19 Had the court followed the instructions given in  
20 the Ninth Circuit case of

21 ROBISON V. UNITED STATES, CA 9th, 1967  
22 379 F.2d 338

23 and made it quite clear, advising the jury again and again  
24 of the prosecution's burden of proving appellant's guilt  
25 beyond a reasonable doubt, and explaining specifically,  
26 as did ROBISON, at page 345;



1 "That burden, as I say, rests upon the  
2 Government and never shifts to the Defendant.\* \* \*  
3 The law does not impose on a Defendant the  
4 burden of producing \* \* \* any \* \* \* evidence."

5 The Ninth Circuit Court in its opinion in ROBISON  
6 took time to probe into "...this word of art - 'entrap-  
7 ment'" and to ponder anew the confusion which abounds in  
8 the doctrine, and to note with interest that the United  
9 States Supreme Court has not reassessed the doctrine nor  
10 the determination of whether it is a question for the  
11 court or the jury, on the grounds that it has not been  
12 properly in issue before the Court.

13 As indicated by the authorities cited under Argu-  
14 ment (III) hereinafter set forth, this Honorable Court  
15 should find that submission of the question of the im-  
16 proper use of government power to the jury was error,  
17 and deprived the appellant of his liberty without due  
18 process of law.

19 Therefore, the judgment of conviction should be  
20 reversed and the appellant given a new trial, with in-  
21 structions that the question of whether or not the  
22 police conduct fell below standards is one for the court,  
23 and the court alone, and never the jury.

24 IV

25 Due process was denied to the appellant when the  
26 formal charge was delayed for an unreasonable time after



1 the offense, to the prejudice of the appellant's ability  
2 to defend himself.

3 ROSS V. UNITED STATES, CDC 1965

4 349 F.2d 210

5 established the principle that a delay in apprising ap-  
6 pellant of the charge against him, and the prejudicial  
7 effect of that delay on appellant's ability to defend  
8 himself against the charge, violated the Due Process  
9 Clause of the Fifth Amendment.

10 In other cases cited in Argument (IV), infra, it  
11 has been established that the length of delay is not the  
12 over-riding factor, but that the crucial question is  
13 whether or not there was prejudice to the defendant's  
14 case.

15 Since the delay made it impossible for appellant  
16 to learn the identify of or the location of an eye-witness,  
17 the only witness who might have impeached the testimony  
18 of the two Agents, this constituted prejudicial delay and  
19 warrants the reversal of his conviction.

20 ...

21 ...

22 ...

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24

25

26



1                   ARGUMENT

2                   I

3                   APPELLANT'S PRIVILEGE AGAINST SELF-  
4                   INCRIMINATION GUARANTEED BY THE FIFTH  
5                   AMENDMENT WAS VIOLATED BY REASON OF HIS  
6                   CONVICTION FOR FAILURE TO COMPLY WITH  
7                   THE REQUIREMENTS OF THE MARIHUANA TAX  
8                   SYSTEM.

9                   - - - - -

10                  The issues here are whether the requirements at-  
11                  tendant to the Marihuana Tax statutes as set out in Title  
12                  26 United States Code Sections 4741 through 4775 would  
13                  have provided information incriminating to appellant,  
14                  and if it would have done so, whether appellant is other-  
15                  wise prevented from asserting the constitutional privi-  
16                  lege.

17                  The code sections referred to below, and any  
18                  Tax Regulations cited herein below, appear in totidem  
19                  verbis in the Appendix attached, or in pertinent part.

20                  Title 26 USC #4741 imposes a tax on all transfers  
21                  of marihuana.

22                  Title 26 USC #4742(a), under which appellant was  
23                  indicted and convicted, makes it unlawful for anyone,  
24                  whether or not required to pay a special tax and register,  
25                  to transfer marihuana without a written order (known in  
26                  the vernacular as a Marihuana demand form).

27                  Title 21 USC #4742(c) regulates the Supply. The  
28                  form is available for sale, not to exceed 2¢, in each  
                    internal revenue district, and consists of an original and



1 two copies. When the purchaser buys the form, he is re-  
2 quired to disclose the date of sale, the name and address  
3 of the proposed vendor, the name and address of the pur-  
4 chaser, and the amount of marihuana ordered.

5 Title 26 USC #4742(d) is entitled PRESERVATION.

6 The original is to be given by the purchaser to any person  
7 who shall transfer marihuana to him and shall be preserved  
8 for a period of two years so as to be READILY ACCESSIBLE  
9 FOR INSPECTION BY AN OFFICER OR EMPLOYEE MENTIONED IN  
10 SECTION 4773 (infra).

11 One copy is retained by the purchaser, with simi-  
12 lar requirements. The other copy is retained by the  
13 Internal Revenue.

14 The abovementioned copy retained by the Internal  
15 Revenue is covered under Title 26 USC #4773, which states  
16 in pertinent part:

17 "The duplicate order forms...and records required  
18 to be preserved under the provisions of 4742...shall be  
19 OPEN TO INSPECTION BY OFFICERS AND EMPLOYEES of the  
20 Treasury Department duly authorized...and such officials  
21 of any State or Territory...as shall be charged with the  
22 ENFORCEMENT OF ANY LAW...REGULATING...MARIHUANA. The  
23 Secretary or his delegate is AUTHORIZED TO FURNISH, upon  
24 written request, certified copies of any of the said  
25 statements or returns...OF ANY OFFICIAL...AS SHALL BE EN-  
26 TITLED TO INSPECT..." (Emphasis ours)



1           Federal Tax Regulations, Section 152.62 defines  
2 the scope of the tax; Section 152.66 requires every person  
3 seeking to obtain marihuana to make application on FORM  
4 679a (Marihuana)..for purchase of an order form. This appli-  
5 cation shall show (a) the transferee's name, address, and,  
6 if registered, the registration number; (b) the name and  
7 address of the transferor, and (c)a description, including  
8 quantities to be transferred.

9           Section 152.69 of the Federal Tax Regulations  
10 states that the triplicate shall be retained by the  
11 district director, preserved for 2 years, so as to be  
12 READILY ACCESSIBLE FOR INSPECTION BY ANY OFFICER, AGENT,  
13 OR EMPLOYEE MENTIONED IN SECTION 4773. (supra) (Emphasis  
14 ours)

15           Appellant was indicted by the September Grand  
16 Jury, 1967, for a violation of Title 26 Section 4742(a),  
17 unlawful transfer of Marihuana without a written order.  
18 He was arraigned, and released on \$2,000 personal surety bond  
19 pending trial as originally set for November 28, 1967.

20           Appellant received a letter, dated October 16,  
21 1967, (BEFORE TRIAL), from the United States Treasury  
22 Department, Internal Revenue Service, District Director,  
23 Los Angeles, California, Supervisor O'Donnell, Correspon-  
24 dence Unit (attached hereto as EXHIBIT ONE) and set out  
25 herewith in pertinent part:



1           "Dear Mr. Frazier:

2           "This office is in receipt of a report from the  
3 Bureau of Narcotics relative to your violation of the  
4 Marihuana Tax Act.

5           "Since the records indicate that you are not  
6 registered under the Marihuana Tax Act, it is requested  
7 that you forward to this office, within the next five  
8 days, the order form required by the Act.

9           "In the event you are unable to produce the order  
10 form, you are liable for the Special Tax, Penalty, and  
11 Transfer Tax, and a bill will be sent to you for such  
12 amounts."

13          The above-quoted letter is *prima facie* evidence  
14 that the transfer tax, the occupational tax, and the  
15 registration requirement are parts of an interrelated  
16 statutory system for taxing illegal activities, and that  
17 an obvious purpose of this statutory system is to coerce  
18 evidence from persons engaged in illegal activities for  
19 use in their prosecution.

20          The federal statutes and penalties prescribed  
21 place the appellant entirely within an area permeated  
22 with criminal statutes, where he is inherently suspect  
23 of criminal activities.

24          The United States Supreme Court on January 29,  
25 1968, handed down three decisions, argued together,  
26 which struck down as unenforceable any statutory scheme



1 enacted by Congress to make effective taxes imposed on  
2 unlawful activities, with requirements which subject any  
3 person to a violation of the privilege against self-in-  
4 crimination.

5 MARCHETTI V. UNITED STATES, 19 L ed 2d 889

6 GROSSO V. UNITED STATES, 19 L ed 2d 906

7 HAYNES V. UNITED STATES, 19 L ed 2d 923

8 MARCHETTI and GROSSO were concerned with wagering  
9 activities, and HAYNES was concerned with statutory require-  
10 ments relating to certain firearms.

11 The Court also relied on its decision in

12 ALBERTSON V. SUBVERSIVE ACTIVITES CONTROL BOARD

13 382 US 70, 15 L ed 2d 165, 86 S Ct 194 (1965)

14 which declared unconstitutional the order of the Board  
15 that members of the Communist party must register,  
16 stating that

17 "Mere association with the Communist Party  
18 presents a sufficient threat of prosecution to  
19 support a claim of the privilege of self-  
20 incrimination."

21 In GROSSO, the Court states, at page 915:

22 "The cases before us present a statutory  
23 system condemned by ALBERTSON. The wagering  
24 excise tax, the occupation tax, and the  
25 registration requirements are only parts of  
26 an interrelated statutory system for taxing  
illegal wagers.



1 "Whatever else Congress may have meant to achieve,  
2 an obvious purpose of this statutory system  
3 clearly was to coerce evidence from persons  
4 engaged in illegal activities for use in their  
5 prosecution."

6 And the Court continues at pages 916-7 in GROSSO:  
7 "The question in these cases...is not whether  
8 all governmental programs which require citizens  
9 to expose their identity are invalid, but  
10 whether this statutory system, designed primarily  
11 for and utilized to pierce the anonymity of  
12 citizens engaged in criminal activity, is  
13 invalid." (Emphasis ours)

14 "...the risks here are obvious and real. A list  
15 of persons who comply with #4401 every month is  
16 invaluable to prosecuting authorities. It must  
17 frequently provide the clinching link in the  
18 chain of conviction.

19 "We must take this statute as it is written and  
20 as it has been applied. Both the statute and  
21 the practice under it clearly further a congres-  
22 sional purpose to gather evidence from citizens  
23 in order to secure their conviction of crime.

24 "There undoubtedly will be other statutes and  
25 practices as to which this determination will  
26 be more difficult to make.



1 "These cases, however, present a statutory  
2 system manifesting a patent violation of the  
3 privilege.

4 "That system must be dealt with uncompromising-  
5 ly to protect against encroachment of the  
6 privilege and to encourage legislative care  
7 and concern for its continuing vitality."

8 It is appellant's contention that the information

9 required by the Marihuana Tax System is directed at a  
10 highly selective group inherently suspect of criminal ac-  
11 tivities; that the information required concerns an area  
12 permeated with criminal statutes; that the hazards of  
13 incrimination created by the requirements can only be  
14 termed real and appreciable; that the information requir-  
15 ed is likely to facilitate arrest and eventual conviction;  
16 that the information required could, to borrow a phrase  
17 from GROSSO (page 916), "start him on the road to prison,"

18 It is therefore appellant's contention that his  
19 proper claim of the privilege against self-incrimination  
20 provides a full defense to any prosecution for failure  
21 to make application for the tax transfer Form 679a (Mari-  
22 huana).

23 It is further contended that the appellant cannot  
24 be said to have waived his privilege by not asserting it  
25 in the lower court. GROSSO states in pertinent part,  
26 paragraph 11, page 909:



1 "The defendant's failure to raise in  
2 the lower courts the issue..(of his)  
3 privilege against self-incrimination is  
4 not an effective waiver of this constitu-  
5 tional privilege, where previous decisions  
6 by the United States Supreme Court had held  
7 that such a conviction did not violate the  
8 privilege."

9 Therefore, as established by these recent decisions  
10 in the Supreme Court, appellant's claim of the privilege  
11 precludes a criminal conviction premised on failure to  
12 meet the requirements of Title 26 United States Code  
13 Section 4742(a).

14 - - - - -  
15 ARGUMENT

16 II

17 APPELLANT'S CONVICTION WAS OBTAINED BY  
18 IMPERMISSIBLE ENTRAPMENT AS A MATTER OF  
19 LAW IN VIOLATION OF THE DUE PROCESS CLAUSE  
OF THE FIFTH AMENDMENT TO THE CONSTITUTION  
OF THE UNITED STATES.

20 - - - - -  
21 The first court to recognize the defense of entrap-  
22 ment was this Honorable Court in 1915, in the case of  
23 WOO WAI V. UNITED STATES, CA 9th, 1915  
24 223 F. 412

25 wherein it established the fundamental doctrine that



1        "...it is against public policy to sustain  
2        a conviction obtained in the manner which is  
3        disclosed by the evidence in this case..."

4        "...a sound public policy can be upheld only  
5        by denying the criminality of those who are  
6        thus induced to commit acts which infringe  
7        the letter of criminal statutes."

8        Chief Justice Hughes first gave the view of the  
9        United States Supreme Court in 1932, in

10       SORRELLS v. UNITED STATES, 287 US 435,  
11       53 S Ct 210, 77 L ed 413, 86 ALR 249 (1932)

12       wherein he cited WOO WAI and gave the same emphasis that  
13       "The defense is available, not in the view  
14       that the accused though guilty may go free,  
15       but that the Government cannot be permitted  
16       to contend that he is guilty of a crime where  
17       the government officials are the instigators  
18       of his conduct..."

19       "...it cannot be supposed that the Congress  
20       intended that the letter of its enactment  
21       should be used to support such a gross per-  
22       version of its purpose."

23       And in a separate opinion in SORRELLS, Mr. Justice  
24       Roberts gave further grounds for the decision:

25       "The efforts of members of these forces to  
26       obtain arrests and convictions have too often  
            been marked by reprehensible methods."



1 "Entrapment is the conception and planning of  
2 an offense by an officer, and his procurement  
3 of its commission by one who would not have  
4 perpetrated it except for the trickery, per-  
5 suasion, or fraud of the officer."

6 "This court...has not heretofore had occasion to  
7 determine (the doctrine's) validity, the basis  
8 on which it should rest, or the procedure to be  
9 followed when it is involved. The present case  
10 affords the opportunity to settle these matters  
11 as respects the administration of the federal  
12 criminal law.

13 "There is common agreement that where a law  
14 officer envisages a crime, plants it, and activates  
15 its commission by one not theretofore intending  
16 its perpetration, for the sole purpose of ob-  
17 taining a victim through indictment, conviction  
18 and sentence, the consummation of so revolting  
19 a plan ought not to be permitted by any self-  
20 respecting tribunal.

21 "The applicable principle is that courts must  
22 be closed to the trial of a crime instigated  
23 by the government's own agents. No other  
24 issue, no comparison of equities as between  
25 the guilty official and the guilty defendant,  
26 has any place in the enforcement of this over-



1                   ruling principle of public policy."

2                   The doctrine of impermissible entrapment has been  
3                   enunciated in other Circuits as well. Circuit Judge San-  
4                   born stated in another leading case

5                   BUTTS V. UNITED STATES, CA8th, 1921

6                   273 Fed. 38

7                   "The first duties of the officers of the law  
8                   are to prevent, not to punish crime. It is  
9                   not their duty to incite to and create crime  
10                  for the sole purpose of prosecuting and  
11                  punishing it."

12                  "...it is unconscionable, contrary to public  
13                  policy, and to the established law of the land  
14                  to punish a man for the commission of an offense  
15                  of the like of which he had never been guilty,  
16                  either in thought or in deed, and evidently  
17                  never would have been guilty of, if the of-  
18                  ficers of the law had not inspired, incited,  
19                  persuaded, or lured him to attempt to commit it."

20                  Circuit Judge Woods stated the applicable principle  
21                  thusly in

22                  NEWMAN V. UNITED STATES, CA4th, 1924

23                  299 Fed. 131

24                  "...decoys are not permissible to ensnare the  
25                  innocent and law-abiding into the commission  
26                  of crime. When the criminal design originates



1 not with the accused but is conceived in the  
2 mind of the government officers, and the accused  
3 is by persuasion, deceitful representation, or  
4 inducement lured into the commission of a crimi-  
5 nal act, the government is estopped by sound  
6 public policy from prosecution therefore."

7 Further enunciation by the Ninth Circuit was given  
8 in the later case of

9 MATYSEK V. UNITED STATES, CA9th, 1963

10 321 F.2d 246

11 in its re-statement of the principles governing the defense  
12 of entrapment:

13 "The principles which should guide a District  
14 Judge when the defense of entrapment is an issue  
15 in a criminal case are set forth in SORRELLS  
16 V. UNITED STATES (citation) and SHERMAN V.  
17 UNITED STATES (citation)."

18 SORRELLS states the principle clearly and simply:

19 "...the CONTROLLING QUESTION (is) whether  
20 the defendant is a person otherwise innocent  
21 whom the Government is seeking to punish for  
22 an alleged offense which is the product of  
23 the creative activity of its own officials."

24 (Emphasis ours)

25 SHERMAN delineates:

26 ...no evidence that petitioner himself was in the



1 trade.

2           ...no narcotics found at apartment.

3           ...no significant evidence that petitioner ever  
4 made a profit on any sale.

5           SORRELLS delineates:

6           ...instigated by the agent.

7           ...creature of his purpose.

8           ...defendant had no previous disposition to commit  
9 it but was an industrious, law-abiding citizen.

10          In the facts at bar, the Government offered no  
11 proof that the appellant was ever convicted of a prior of-  
12 fense, or that he was a user, or that he was "in the  
13 trade."

14          There was no proof that appellant's residence in-  
15 dicated in any way that Marihuana was kept there, or  
16 trafficked there, or used there.

17          There was no significant evidence offered in proof  
18 that appellant ever made a profit on any sale. There was  
19 only the uncorroborated testimony by Agent Knapp that he  
20 and appellant had a conversation about future transactions,  
21 and the law was established in

22          NEWSOM V. UNITED STATES, CA5th, 1964

23           335 F.2d 237

24 that subsequent conversations as to other marihuana cannot  
25 furnish the basis for a conviction for the sale of marihuana.

26 The facts at bar definitely establish that Agent



1 Knapp made the initial overture, that Agent Knapp created  
2 the plan to have appellant's friend, informer Craig Lasha,  
3 take Agent Knapp to the appellant's birthday party to in-  
4 troduce him as a "friend, that Agent Knapp, as delineated  
5 in the Resume of Evidence, initiated every move of the plan.

6 Throughout his testimony, he consistently used such  
7 phrases as

8        "I asked Mr. Frazier if he could purchase narcotics..

9        "I asked for his telephone number..."

10      "I told him I would contact him later..."

11      "I made a telephone call.."

12      "I asked him if I could purchase marijuana.."

13      "I would call back.."

14      "I did."

15      "I asked if I could purchase the marihuana..."

16      "I drove to his residence."

17      "I gave him the money."

18      "I took the bag out of the car.."

19      It is to be noted that there was no proof that  
20     appellant has ever been involved in any kind of criminal  
21     activity at any time in his life. Certainly the phrases  
22     used above point to the conclusion that the suggestion of  
23     appellant participating in a criminal act originated with  
24     an officer of the government.

25      Agent Knapp testified on direct that appellant drove  
26     to the destination, but on cross-examination,



1 Agent Knapp was asked if he told appellant that Knapp's own  
2 car was malfunctioning and it would be better if they used  
3 Frazier's car. Knapp testified: "I may have, I don't  
4 recall." (T.74)

5 One point is obvious: appellant's car had a flat  
6 tire, and it was necessary to go to the gas station, fix  
7 the tire, return to the house, and mount it on the car  
8 before the Frazier car could be used. Fortunately, Agent  
9 Henry, in surveillance nearby, was able to recall that he  
10 saw appellant return with a tire. (T.93)

11 This, of course, constitutes another of the entrap-  
12 ment devices used by Agent Knapp - this one to bring about  
13 an element of the crime of TRANSPORTING, (i.e., tricking  
14 appellant into using his own car to transport the Marihuana.)

15 Knapp testified that when appellant returned to  
16 the car, appellant told Knapp the source of supply did not  
17 want to meet Knapp. (T.57)

18 Attached hereto as EXHIBIT TWO is a copy of Agent  
19 Knapp's report, made out on July 3, 1967, 5 days after the  
20 transaction, which states at page 2, paragraph 7:

21 "The agent told Frazier that he (Knapp)  
22 didn't want to meet the source of supply's  
23 helper."

24 Caveat: *Falsus in uno, falsus in omnibus.* Where  
25 the witness has occasion to correct the mistake and does  
26 NOT, then the instruction that a witness false in one thing



1 is not necessarily false in all things, is not seemly.

2 It is particularly interesting to note that Agent  
3 Knapp, during cross-examination, was given his report "to  
4 refresh his memory", AFTER the above statement was made.  
5 He read through the report before cross-examination con-  
6 tinued. (T.77)

7 Only a few minutes later, the prosecutor, on re-  
8 direct, asked ONLY ONE QUESTION - why Agent Knapp remained  
9 in the car alone and did not go with appellant and Mister  
10 X; and again Agent Knapp stated:

11 "Mr. Frazier told me that the unidentified  
12 male did not want to meet me." (T.82)

13 Yet only minutes before, Agent Knapp read in his  
14 own report that he told Frazier he did not want to meet  
15 the source of supply's helper.

16 Again, entrapment by tricks to cover other elements  
17 of the crimes of "sale" and "possession", thus to establish  
18 the "presumption of guilt". In this manner, appellant was  
19 required to TAKE THE MONEY from the agent and give it to  
20 the Young Negro Male; appellant was thus required to  
21 BRING THE MARIHUANA from the Young Negro Male to Agent Knapp.  
22 Had Agent Knapp accompanied them, appellant would NOT have  
23 handled the money NOR the marihuana, thus not violating  
24 the elements necessary to "selling", "possession", "trans-  
25 ferring", etc.

26 It is certainly to be noted that both the Agents



1 testified appellant put the brown bag in the car (in other  
2 words, there was no PERSONAL transfer from appellant to  
3 Knapp), and when they returned to appellant's residence,  
4 Knapp testified that "I inspected the contents....I took  
5 the bag out of the car, walked across the street and put it  
6 in the Government car..." (T.59)

7 It would appear that Agent Knapp possibly slipped  
8 up in his plan of establishing the important element of  
9 TRANSFERRING, which would then make the necessary transfer  
10 form unnecessary as far as appellant is concerned. And  
11 Agent Henry returned to the residence apparently too late  
12 to serve as corroboration for this element.

13 Agent Knapp stated there was some conversation  
14 about future purchases, overheard by no one else,  
15 that appellant complained he hadn't made enough to justify  
16 the trip. (T.60)

17 This was added, undoubtedly, to further entrap  
18 appellant by establishing that appellant was "in the  
19 business of" dealing in illegal Marihuana.

20 It is worthy of note that the money given by  
21 Agent Knapp to appellant to give to the source, was  
22 "previously recorded" government money. (T.58) Agent  
23 Knapp never saw appellant receive any "share" of the money,  
24 nor did he show Knapp any money he might have received,  
25 nor did Agent Knapp have appellant arrested with the  
26 recorded money on him.



1 Instead, Agent Knapp left the residence on June  
2 28th, and appellant was arrested THREE MONTHS LATER on  
3 September 13th.

4 It should constantly be kept in mind that the of-  
5 fenses here are related to MARIHUANA, and NOT narcotics.  
6 Even the Trial Judge, in his instructions, used the term  
7 "to purchase narcotics -- marijuana in this case" which  
8 in itself IMPLIES that marijuana is a narcotic. (T.157)

9 The serious difference of being involved with  
10 dangerous and addictive drugs (i.e., Narcotics), and the  
11 non-addictive weed (i.e., Marihuana) is an element that  
12 too often gets lost in the minds of jurors and others,  
13 particularly when AGENTS of the Federal Bureau of NARCOTICS  
14 testify, using the word "narcotics" as if that is what  
15 the accused were involved with - a dangerous and addictive  
16 drug - as opposed to "Marihuana" - a non-dangerous and  
17 non-addictive drug. As did Agent Knapp testify at the  
18 very outset of the trial -

19 "I asked Mr. Frazier if he could purchase  
20 some narcotics for me." (T.54)

21 The offenses charged against the appellant are con-  
22 cerned only with MARIHUANA, a non-addictive, non-dangerous  
23 WEED.

24 This is brought to this Honorable Court's atten-  
25 tion to further heighten the plight of persons accused of  
26 crimes, whose fundamental rights too often are ignored,



1 and who very often find their liberty at stake with jurors  
2 who are apparently expected to be experts on narcotics and  
3 marihuana, and who are expected by the learned and erudite  
4 judiciary to take enormously complicated instructions and  
5 apply them as if their mental capacities were as legally  
6 flexible as those of the judge who pronounced them.

7 Yet, this same judiciary will take unusual time  
8 to explain words in the instructions such as the following  
9 at T.153:

10 "Let me define 'concealment'. To conceal, as  
11 you would expect, means to hide or keep from  
12 sight or view."

13 "'Unlawfully' means contrary to law."

14 Honorable Court, this is not to swat at gnats, but  
15 to suggest that it would be far more important to apprise  
16 the jurors of the meaning of "Narcotics" as opposed to  
17 "Marihuana"; as to the meaning of "Dangerous Drugs" as  
18 opposed to "Marihuana"; as to the meaning of "Addictive  
19 Drugs" as opposed to "Marihuana".

20 Bringing to justice those who would help bring  
21 about the ADDICTION of persons to DANGEROUS DRUGS more  
22 properly should be the focus of a Federal Bureau entitled  
23 NARCOTICS; and the tremendous amount of the taxpayers'  
24 money spent on "buys" and manpower should more properly  
25 be relegated to curb the evils of DANGEROUS DRUGS, in-  
26 stead of spending thousands of dollars to entrap an in-  
nocent, law-abiding citizen into helping get a friend



1 (Agent Knapp) some "pot":

2 Any teen-ager, college student, young adult, and  
3 most anyone else, can at any time, in any area, get "pot".  
4 It does not take the United States Treasury Agents, Fed-  
5 eral Bureau of Narcotics, to find "pot".

6 It would help, however, if the United States  
7 Treasury Agents, Federal Bureau of Narcotics, would find  
8 the sources of the "hard stuff". This IS difficult, this  
9 is COSTLY, and this is appropriate to a Bureau of NARCOTICS.

10 The informer, Craig Lasha, was not listed as a  
11 Government witness on the trial memorandum. At the trial,  
12 defense counsel, learning for the first time who the in-  
13 former was, asked for Lasha to appear. The court ordered  
14 Lasha in, but the Government refused to put him on as  
15 their witness, thus putting defense counsel in the posi-  
16 tion of either making Lasha his own witness, or not using  
17 him at all.

18 According to Agent Knapp's testimony, Lasha was  
19 present at the INITIAL CONTACT, on June 10th. Therefore,  
20 Lasha's testimony would have established one of two  
21 things: EITHER that a government official was the insti-  
22 gator and appellant was tricked into being an "unwary  
23 criminal", OR that the governmental official was not the  
24 instigator and appellant was a "wary criminal".

25 Since Lasha's identification and "cooperative"  
26 status had been established as a matter of public record,



1 the Government's refusal to put him on as its witness,  
2 thus allowing defense counsel the right of cross-examina-  
3 tion, logically can mean only one thing: the Government  
4 knew Lasha's testimony would establish that the plan was  
5 conceived by a government official, and that the appellant  
6 was the victim of impermissible conduct by that govern-  
7 ment official.

8       This is entrapment as a matter of law.

9       In the facts at bar, the Government offered no  
10 proof that the defendant had ever had any previous dis-  
11 position to commit any crime, and offered no proof that  
12 he was anything but an industrious, law-abiding citizen.  
13 At the proceedings on January 8, 1968, T.172 and particu-  
14 larly at T.176, it is definitely established that appellant  
15 is an industrious, law-abiding citizen, who has a respon-  
16 sible job, a young wife who was pregnant with their first  
17 child (on April 11, 1968, they became parents of a 10-lb.  
18 6-oz. baby girl); also, the Government made no protest to  
19 the requirements of an appeal bond. It is certainly in-  
20 dicated that appellant was not considered to be "in the  
21 trade", and there was no indication from the Government  
22 that appellant was PRONE TO CRIME.

23       Instead, it is contended the testimony established  
24 that appellant was deliberately entrapped into each of  
25 the elements which constitute the crimes charged in the  
26 Grand Jury indictment:



1           ...tricked into making contact  
2           ...tricked into using his car  
3           ...tricked into going to the source  
4           ...tricked into taking the money to the source  
5           ...tricked into transferring the Marihuana  
6           Thus we have all of the elements of the code  
7           sections violated: receiving, transporting, concealing,  
8           selling, facilitating, possessing, and transferring.

9           And now the United States Treasury Department,  
10          Internal Revenue Service, as per the letter in EXHIBIT  
11          TWO, is trying to

12          ...trick him into paying Special Taxes,  
13           Penalties, and Transfer Taxes.

14          To quote again from the sound reasoning of  
15          SORRELLS V. UNITED STATES (supra):

16          "Thus the Government plays on the weaknesses  
17          of an innocent party and beguiles him into  
18          committing crimes which he otherwise would  
19          not have attempted. Law enforcement does  
20          not require methods such as this."

21          Ninth Circuit Judge Weigel, in MATYSEK V. UNITED  
22          STATES, supra, pointed to the evils of the ugly pattern  
23          arising under enforcement of the law:

24          "In cases such as this, the law compels us,  
25          it seems to me, to become part of a process  
26          of futile nibbling at the outermost fringes



1 of the real evils and to condone methods  
2 of obtaining evidence which have no  
3 virtue save effectiveness."

4 These METHODS were referred to by Mr. Justice  
5 Roberts in SORRELLS (supra) as "reprehensible", and he  
6 pithily remarked further:

7 "Public policy forbids such sacrifice  
8 of decency."

9 The appellant contends that judgment and sentence  
10 were imposed on him in violation of the public policy  
11 which prohibits such convictions as a result of imper-  
12 missible entrapment; that as J. Roberts of the Supreme  
13 Court of the land stated:

14 "Courts must be closed to the trial of a  
15 crime instigated by the government's own  
16 agents."

17 "No other issue...has any place in the  
18 enforcement of this overruling principle  
19 of public policy."

20 "The judgment should be reversed and the  
21 cause remanded to the District Court with  
22 instructions to quash the indictment and  
23 discharge the defendant."

24 (SORRELLS V. UNITED STATES, 77 L.Ed.413,  
25 426; 287 US 435, 53 S Ct 210, 86 ALR 249,  
26 1932.)



III

THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT GAVE MISLEADING AND PREJUDICIALLY ERRONEOUS INSTRUCTIONS TO THE JURY AS TO THE QUANTUM OF PROOF OF THE DEFENSE OF ILLEGAL ENTRAPMENT. FURTHER, WHETHER THE POLICE CONDUCT FELL BELOW STANDARDS AND THUS WAS AN IMPROPER USE OF GOVERNMENT POWER, IS A QUESTION FOR THE COURT, AND NOT THE JURY, AND SUBMISSION OF THE QUESTION TO THE JURY RESULTED IN APPELLANT BEING DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

The court gave the following instructions on en-

trapment, set out here in totidem verbis: (T.156-7-8)

"Now, there has been raised the issue of entrapment.

And let me give you an instruction on that point.

"The law recognizes two kinds of entrapment:

unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person has the readiness and the willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit sale of marijuana, it is not unlawful entrapment



1 for a Government agent to pretend to be someone else and  
2 to offer, either directly or indirectly, to purchase nar-  
3 cotics -- marijuana in this case -- from the suspected  
4 person.

5 "If, then, the jury should find beyond a reason-  
6 able doubt from the evidence in the case that before any-  
7 thing at all occurred respecting the alleged offense or  
8 offenses involved in this case, if the jury should find  
9 that the accused was ready and willing to commit the crime  
10 such as charged in the indictment, whenever opportunity  
11 was offered, and that the Government agents did no more  
12 than offer an opportunity, the accused is not entitled to  
13 the defense of unlawful entrapment.

14 "If the accused had no previous interest or  
15 purpose to commit any offense of the character here charged,  
16 and did so only because he was induced or persuaded by some  
17 agent of the Government, then the defense of unlawful entrap-  
18 mend is a just defense and the jury should acquit the  
19 defendant.

20 "In this regard, if the jury should have any  
21 reasonable doubt from the evidence in the case as to  
22 whether the defendant was the victim of an unlawful entrap-  
23 ment, the jury should acquit the accused."

24 This Honorable Court in

25 NOTARO V. UNITED STATES, CA9th, 1966

26 363 F.2d 169

enunciated with marked clarity, and with the most reliable



1 authority the dangers involved in the instructions to be  
2 given with reference to the defense of entrapment. Quoting  
3 from page 175:

4 "When a party has the burden of proof as to a  
5 factual issue, it cannot be proper that instruc-  
6 tions pertaining to the issue are so vague or  
7 ambiguous as to permit of misinterpretation by  
8 the jury of the standard which is to be applied.  
9 The desire of a careful judge to avoid language  
10 which to him may seem unnecessarily repetitive  
11 should yield to the paramount requirement  
12 that the jury in a criminal case be guided  
13 by instructions framed in language which is  
14 unmistakably clear."

15 On page 176, the reader is referred to footnote 7,  
16 the Court remarking on

17 UNITED STATES V. PUGLIESE, CA2d, 1965  
18 346 F.2d 861

19 "...wherein appears criticism of jury instruc-  
20 tions which undertook, as did the instructions  
21 in the case at bar, to distinguish between  
22 'lawful entrapment' and 'unlawful entrapment'."

23 A more appropriate and less confusing term,  
24 "impermissible entrapment", was used by the Ninth Circuit  
25 in the case of

26 ROBISON V. UNITED STATES, CA9th, 1967  
379 F.2d 338



1       The Court in ROBISON stated at page 345 that use  
2       of the words "lawful" and "unlawful" were not improper  
3       IN THIS CASE (i.e., ROBISON) since the other instructions  
4       properly advised the jury of the burden-of-proof standard  
5       to be applied. Nevertheless, the Court went on to dis-  
6       cuss the heart of the matter:

7       "....the term 'entrapment' has become a  
8       word of art..."

9       "....this word of art--'entrapment'--embodies  
10      one of the most confusing concepts in the  
11      law."

12      "If the entrapment concept is demonstrably  
13      confusing to judges and lawyers, then  
14      a multo fortiori it must be confusing to  
15      laymen on the jury." (at page 346)

16      This Ninth Circuit opinion continues at

17      page 346:

18      "We think it requires but little reflection  
19      to convince that the difficulties in giving  
20      effect to the public policy upon which the  
21      mis-called 'defense' of entrapment is based  
22      would lessen considerably, if the matter were  
23      withdrawn as a fact question for the jury and  
24      consigned to the 'supervisory authority over  
25      the administration of criminal justice in  
26      the federal courts.' (See MCNABB V. UNITED



1 STATES, 318 US 332,341, 63 S Ct 608,613,  
2 87 L ed 819 (1943).)"

3 The opinion continues on the note that the United  
4 States Supreme Court has as yet declined "to reassess the  
5 doctrine of entrapment" the reason given, in numerous  
6 cases, that to do so "would be to decide the case on  
7 grounds \* \* \* not raised here or below by the parties  
8 before us."

9 The Ninth Circuit opinion in ROBINSON then states  
10 at page 347:

11 "If the question were RES INTEGRA here, we  
12 would readily certify to the Court (see  
13 28 USC #1254(3)) the question whether the  
14 issue of entrapment should not always be  
15 decided by the court and never submitted  
16 to the jury."

17 Chief Justice Warren's opinion in SHERMAN (*supra*)  
18 and the companion case of

19 MASCIALE V. UNITED STATES, 356 US 386,  
20 2 L ed 2d 859, 78 S Ct 827

21 (both cases decided May 19, 1958) stated that the Court  
22 declined to consider the question, not raised by the  
23 parties, whether factual issues of entrapment are deter-  
24 minable by the judge or the jury.

25 In concurring in the result, Justice Frankfurter,  
26 with the concurrence of DOUGLAS, HARLAN AND BRENNAN, JJ.,



1 expressed the view that, as regards entrapment, the crucial  
2 question is whether the police conduct revealed in a parti-  
3 cular case falls below standards, to which common feelings  
4 respond, for the proper use of government power, and that  
5 this is a question appropriate for the court and not for  
6 the jury.

7 As stated in

8 WHITING V. UNITED STATES, CALST, 1963

9 321 F.2d 72 at 77 n.12

10 "Liberty is too priceless to be made so  
11 significantly dependent upon a jury's  
12 ability to interpret fine distinctions  
13 and to apply different measures or standards  
14 as to the burden of proof in a criminal  
15 case."

16 Appellant contends it was error to submit to the  
17 jury the question of whether the police conduct fell below  
18 standards and thus was an improper use of government power.  
19 It is the province of the court, and of the court alone,  
20 to protect itself and the government from such prostitu-  
21 tion of the criminal law.

22 Therefore, the appellant contends that he has been  
23 deprived of his liberty without due process of law as  
24 guaranteed to him under the Fifth Amendment to the Consti-  
25 tution of the United States.



The matter is now RES INTEGRA, and should be given a definite standard by this Ninth Circuit Court, or should be certified to the United States Supreme Court under Title 28 Section 1254(3), as suggested by this Honorable Court in

ROBISON V. UNITED STATES, CA9th, 1967

379 F.2c 338, 347.

## ARGUMENT

IV

THE UNREASONABLE DELAY BETWEEN THE OFFENSE AND THE ARREST PREJUDICED APPELLANT'S ABILITY TO DEFEND HIMSELF AND WAS A VIOLATION OF DUE PROCESS THUS VIOLATING RIGHTS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Rule 48(b), Federal Rules of Criminal Procedure, states in pertinent part:

"If there is unnecessary delay in PRESENTING THE CHARGE TO A GRAND JURY ... the court may dismiss the indictment." (Emphasis ours)

Although the United States Supreme Court and many Circuit Courts have not ruled precisely on the issue, there is a consistency stated by most of courts that a delay in apprising appellant of the charges against him and the prejudicial effect of that on his ability to defend himself may constitute



1 a denial of due process under the Fifth Amendment.

2 ROSS V. UNITED STATES, CDC, 1965

3 349 F.2d 210

4 established a rule of fairness designed to protect innocent  
5 people from conviction made possible by the delay attendant  
6 on undercover police investigation. And in

7 WOODY V. UNITED STATES, CDC, 1966

8 370 F.2d 214

9 the court delineated the Ross rule with these words:

10 "The ultimate prejudice to the accused,  
11 the risk that he will be convicted although  
12 innocent, is not reflected in the evidence  
13 presented at trial. But it nevertheless  
14 exists if the accused has been unable to  
15 prepare a defense because of the delay  
16 before arrest."

17 In the ROSS case, the delay was 7 months; in  
18 the WOODY case, the delay was 4 months. The court held  
19 in WOODY that

20 "While mere delay of four months between  
21 alleged purchase of narcotics by under-  
22 cover officer and arrest was not so un-  
23 reasonable as to warrant reversal in absence  
24 of special circumstances, under the circum-  
25 stances surrounding accused's prosecution,  
26 the delay was prejudicial and warranted  
reversal of his conviction."



1       In WOODY, as in appellant's case at bar, there was  
2       an instance of potential prejudice which went well beyond  
3       the usual protestation of inability to remember (as in  
4       the ROSS case). The court, referring to the unavailability  
5       of a key defense witness, commented:

6             "It is the kind of circumstance which  
7       would warrant an inquiry into prejudice in  
8       a case despite the fact that the delay did  
9       not exceed four months."

10      The transaction for which appellant was indicted  
11     occurred on June 28, 1967, but he was not arrested until  
12     September 13, 1967, roughly three months later.

13      Reference is made at various points by both of the  
14     Agents in the Transcript of Testimony to a "young male  
15     Negro" who was present during the June 28th transaction.

16      The Agent's report (attached hereto as EXHIBIT TWO)  
17     written July 3, 1967, states in paragraph 13, page 3, that  
18     this Young Male Negro "has not yet been identified". This  
19     is the same report, and the ONLY report, defense counsel  
20     was allowed to see, and then only just before trial.  
21     This is the same report that has most of the first and  
22     second lines heavily inked out. The inked-out lines re-  
23     vealed during trial that the name of the informer, was Craig  
24     Lasha, and that it was Lasha who took Agent Knapp to ap-  
25     pellant's residence on June 10th.

26      Obviously this Young Male Negro (Mister X) was



1 of vital importance to the appellant's case. The trial  
2 testimony of Agents Knapp and Henry revealed that Mister X  
3 had been identified, after the report was written, but not  
4 by them. As far as this trial record is concerned, the  
5 name of Mister X has never been revealed to appellant, nor  
6 has it been revealed in any manner which would have given  
7 the appellant access to the information.

8 Further, the almost complete disinterest by the  
9 Agents in this most vital witness to appellant indicates  
10 further that the appellant was not only entrapped, but  
11 was denied the opportunity to contact this valuable witness  
12 by the pre-arrest delay of three months.

13 Had appellant known he would have to account for  
14 his actions on June 28th, he might have been able to locate  
15 Mister X. However, upon arrest three months later, and  
16 ever since, appellant has made every possible effort to  
17 trace him, but to no avail.

18 The Government saw fit to allow into testimony  
19 ONLY the fact that the car driven by the "Young Male  
20 Negro" belonged to a female individual, named in the  
21 Agent's report.

22 It is to be further noted that Agent Henry cor-  
23 robated only ACTIONS. He was not present during any  
24 CONVERSATIONS between Agent Knapp and the appellant,  
25 and/or the Young Male Negro. And, most notably, Agent  
26 Henry was not present during any conversations at the



1 "initial" contact on June 10th.

2       The appellant did not take the witness stand, since  
3 any possibility of corroboration was denied him when he  
4 was unable to find any trace of his only eye-witness, his  
5 only "ear-witness".

6       Although it cannot be stated that the Young Male  
7 Negro WOULD have established a defense for appellant,  
8 nevertheless it can be said that he MIGHT have. For  
9 example, he MIGHT have testified that the Agent insisted  
10 on handing the money to appellant, even though appellant  
11 simply handed the money to Mister X who MIGHT have been  
12 standing beside appellant.

13       Mister X MIGHT have testified that he personally  
14 handed the Marihuana DIRECTLY to Agent Knapp and that  
15 appellant never touched it; and that it was he, the Young  
16 Male Negro, who had no written order form nor requested  
17 one from the Agent.

18       This Young Male Negro MIGHT have testified that  
19 appellant participated strictly as a favor to a friend  
20 ( Agent Knapp ); and received absolutely NO MONEY for  
21 his courteous efforts.

22       Thus, the special circumstance here, which places .  
23 appellant under the ROSS and WOODY rulings, was the un-  
24 availability of the key witness, the Young Male Negro,  
25 since he was the ONLY person who could have impeached the  
26 testimony of Agents Knapp and Henry.



1           Although dissenting from the majority opinion in  
2 WOODY V. UNITED STATES, supra, Circuit Judge Burger never-  
3 theless points out:

4           "No matter how short the period of neces-  
5 sary and purposeful delay, a defendant may  
6 prevail if he can show sufficient prejudice."

7           Chief Judge Bazelon, in the majority opinion in  
8 WOODY, succinctly stated the basis for his concern:

9           "Delays prior to arrest which hinder  
10 or prevent presentation of a defense  
11 shackle our system of determining truth  
12 through the adversary process."

13           Appellant was thus so prejudiced by the pre-arrest  
14 delay as to be unable to defend himself and was denied  
15 due process under the Fifth Amendment to the Constitution  
16 of the United States.

17           - - - - -



1                           CONCLUSION

2  
3         By reason of appellant's assertion of his privilege  
4         against self-incrimination which precludes his criminal  
5         conviction premised on a failure to comply with the re-  
6         quirements of the Marihuana Tax System, the conviction  
7         and judgment appealed from should be reversed and remanded  
8         to the United States District Court for the Central District  
9         of California with directions to quash the indictment and  
10        discharge the defendant.

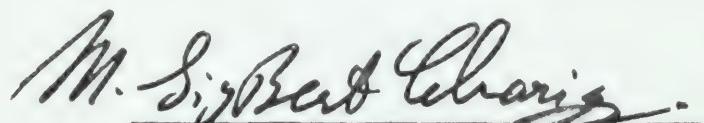
11  
12        By reason of the contravention of public policy  
13        inherent in a conviction obtained by impermissible entrap-  
14        ment, thus violating the Due Process Clause of the Fifth  
15        Amendment to the Constitution of the United States, the  
16        conviction and judgment appealed from should be reversed  
17        and the case remanded to the United States District Court  
18        for the Central District of California with directions to  
19        dismiss the indictment against the defendant.

20  
21        By reason of the misleading instructions given  
22        by the trial court to the jury, and by reason of the sub-  
23        mission to the jury of a matter purely within the province  
24        of the court, thus depriving the appellant of his liberty  
25        and denying him due process of law under the Fifth Amend-  
26        ment, he is entitled to a new trial free from such error.



1 By reason of the unreasonable delay between  
2  
3 the offense and the arrest which prejudiced appellant's  
4 ability to defend himself, thus creating a violation of  
5 due process as guaranteed by the Fifth Amendment, the  
6  
7 conviction and judgment appealed from should be reversed  
8 and the case remanded to the United States District Court  
9  
10 for the Central District of California with directions  
11 to dismiss the indictment against the appellant.  
12

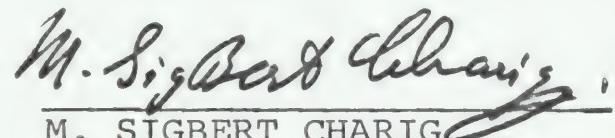
13 Respectfully submitted,

14   
15 M. Sigbert Charig  
16 M. SIGBERT CHARIG  
17 ATTORNEY FOR APPELLANT  
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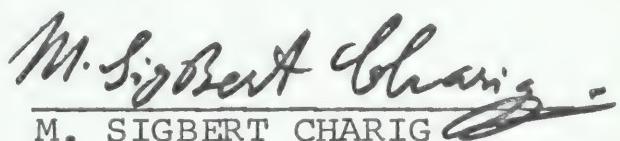
1                           CERTIFICATE

2                           I certify that, in connection with the preparation  
3 of this brief, I have examined Rules 18, 19 and 39 of  
4 the United States Court of Appeals for the Ninth Circuit,  
5 and that, in my opinion, the foregoing brief is in full  
6 compliance with those rules.

7                             
8                           M. SIGBERT CHARIG  
9                           ATTORNEY FOR APPELLANT

10                          PROOF OF SERVICE

11                          I hereby certify that I have this day forwarded  
12 by mail to the United States Circuit Court of Appeals for  
13 the Ninth Circuit twenty copies of the Opening Brief of  
14 Appellant, and that three copies of the brief have been  
15 forwarded this day by mail to the office of the United  
16 States Attorney, attention of Assistant U. S. Attorney  
17 James E. Shekoyan, Attorneys for Appellee, U. S. Court-  
18 house, 312 North Spring Street, Los Angeles, California,  
19 90012. I further certify that the Appellant's Opening  
20 Brief may be timely filed upon receipt thereof by the  
21 Clerk of the said Court.

22                            
23                          M. SIGBERT CHARIG  
24                          ATTORNEY FOR APPELLANT



1                   EXHIBITS

2

3 EXHIBIT ONE:

4                   Letter from United States Treasury Department,  
5                   Internal Revenue Service, dated October 16,  
6                   1967, consisting of one page.

7

8

9 EXHIBIT TWO:

10                  Report of United States Treasury Agent,  
11                  Roger Knapp, Federal Bureau of Narcotics,  
12                  dated July 3, 1967, consisting of three pages.

13                  ...

14                  ...

15                  ...

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26



INTERNAL REVENUE SERVICE  
DISTRICT DIRECTOR  
LOS ANGELES, CALIFORNIA 90012

October 16, 1967

IN REPLY REFER TO  
1112:688-  
DB:1210

Mr. Dennis Frazier  
6615 Farmdale St.  
North Hollywood, Calif.

EXHIBIT ONE

Dear Mr. Frazier:

This office is in receipt of a report from the Bureau of Narcotics relative to your violation of the Marihuana Tax Act.

Since the records indicate that you are not registered under the Marihuana Tax Act, it is requested that you forward to this office, within the next five days, the order form required by the Act.

In the event you are unable to produce the order form, you are liable for the Special Tax, Penalty, and Transfer Tax, and a bill will be sent to you for such amounts.

Very truly yours,

*J. G. O'Donnell*

Supervisor, Correspondence Unit

EXHIBIT ONE



MADE

Los Angeles, Calif.  
July 3, 1967

RELATED FILES

OTHER OFFICERS

Roger D. Knapp  
Narcotic AgentNarcotic Agents:  
Eric V. Gatz  
Antonio A. Colaya  
Humberto P. Moreno  
Charles J. Henry

PURCHASE OF THIS MEMORANDUM Purchase of Rx. #1, 1025.700 grams of marijuanna, from PRASIER, et al, for \$520.00 CAF by Agt. Knapp on 6/29/67 at Los Angeles, Calif.

(If report is over two pages in length summarize in first paragraph)

RECOMMENDATION

PENDING:

CLOSE:

FURTHER INVESTIGATION: mc:  
not  
cert  
clerk  
✓

1. On June 10, 1967, [REDACTED] The agent and PRASIER talked about future narcotic purchases and PRASIER then gave the agent his phone number. On June 26, 1967, Agent Knapp telephoned PRASIER at 765-2716, a non-published number listed to PRASIER at 6615 Ferndale St., North Hollywood, Calif. Arrangements were made for Agent Knapp to purchase 5 kilograms of marijuanna from PRASIER on June 27, 1967.
2. On June 27, 1967, Agent Knapp telephoned PRASIER at the above number. PRASIER said that the marijuanna was ready. The agent and the defendant agreed to meet for the purchase about 8:00 PM on this date at the defendant's residence.
3. About 8:00 PM on June 27, 1967, Agent Knapp, under the surveillance of Agents Gatz, Colaya, Moreno, and Henry, drove government vehicle H-2970 to PRASIER's residence and parked. As the agent parked, the defendant, Mr. Wm. Stanley, in his front yard near the street, approached the car. The defendant and the undercover agent had a brief conversation about the quantity and the quality of the marijuanna and also on the procedure of the transaction.
4. After a few minutes of conversation, the agent got out of the car and both he and the defendant went into the defendant's house. The conversation continued in the house until about 8:30 PM. At this time, the defendant and the agent entered the defendant's 1962 Chevrolet Nova, California license 185-613, which was parked on the driveway next to the house.
5. The agent and the defendant, with PRASIER driving, proceeded to the intersection of Avenue and Duckwiler Street in Los Angeles where they parked on the northwest corner at about 9:15 PM. Prior to this junction, the agent and the defendant discussed the possibility for sale of larger amounts of marijuanna. The defendant said that he knew many people who could supply smaller amounts. He did say, however, that the person from whom he was getting his agent's five kilograms, could supply 30 kilograms.

OF THIS MEMO FURNISHED TO

SIGNATURES

EAU:

\*\*\*\*\* 2cc

EXHIBIT TWO

DISTRICT NO. 14(SF) .... 2cc

Roger D. Knapp

APPROVED: [Signature]

(DISTRICT SUPERVISION)



Memo re purchase of Exhibit #1 from Dennis FRAZIER.  
grams without any difficulty.

6. After parking at the above mentioned intersection, FRAZIER got out of his car and walked north on Cochren Street and disappeared from view. A few minutes later he returned to his car. He told the agent that the source of supply didn't want to meet the agent because he was white. He further said that the source of supply had arranged for another person to handle the transaction and that this person wanted the money before he would get the marijuana.

7. The ~~agent~~ told FRAZIER that ~~he~~ didn't want to meet the source of supply's helper. It was then agreed that ~~FRAZIER~~ would go with the other person to get the marijuana. The ~~agent~~ gave \$20.00 advance funds to FRAZIER who, in turn, got into a 1963 Chevrolet Corvair, California license USK-687, which was parked immediately in front of FRAZIER'S car. During the above conversation, a young negro male had entered the above mentioned Chevrolet.

8. As the agent waited in FRAZIER'S car, FRAZIER and the unidentified negro male drove east on Euclid Miller Street and disappeared from view. About 10:00 PM, FRAZIER and the other negro male returned in the Chevrolet and parked in front of FRAZIER'S car. FRAZIER got out of the car with a Jumbo shopping bag, which he put in the back seat of his car. At this time, the unidentified negro male, who was driving the Chevrolet, got out of the car, walked north on Cochren Street and disappeared from view.

9. After FRAZIER put the shopping bag in his car, he got in and then he and the agent drove in a round about route back to FRAZIER'S residence. Enroute to FRAZIER'S residence, FRAZIER and the agent ~~talked about~~ various other illicit means of making money. The defendant then said that he was making good money on the sale of tires. On further inquiry, he said he was a government employee and had access to new government owned tires. He said he was selling sets of new four-ply Firestone tires, which retailed for about \$39.00 each, for \$20.00 per tire.

10. The undercover agent said he was interested in buying new tires. FRAZIER said that he would get the agent any type that he wanted. He said, however, that he was temporarily out of business as they had a new manager who was keeping a close check on supplies. He further said that he could get the tires in a month or so when the situation was more favorable.



Memo re purchase of Exhibit #1 from Dennis FAZIER, et al.

11. About 10:30 PM, FAZIER and the undercover agent arrived at the defendant's house and parked in the driveway. Some conversation ensued during which FAZIER said he thought tonight's source of supply could supply the 30 kilograms of marijuana for about \$45.00 per kilogram. FAZIER then made a telephone call. On completion of the phone call, he said he had just called the source of supply about the 30 kilograms and the source of supply would call him back later. A few minutes later, the agent returned to his car and then left the area. ~~He took no hardware out of car.~~
12. Exhibit #1, 1025.700 grams of marijuana, was contained in five bricks wrapped in wrapping paper (3-blue, 1-red, and 1-yellow) and further wrapped in clear cellophane. The exhibit was further contained in a Britt shopping bag. This exhibit was stored and on June 29, 1967, it was weighed and sealed by Agent Knapp, as witnessed by Agent Henry, and then hand carried to the Los Angeles Sheriff's Crime Laboratory for analysis.

13. DESCRIPTION OF PURCHASER:

Dennis FAZIER & James FAZIER is a negro male, born June 12, 1942 in Ohio. He is 6'0" tall, weighs 225 pounds, and has black hair, brown eyes, heavy build, and a dark complexion. He has a 1/2" scar on his forehead and is now wearing a narrow beard. At the time of the purchase, he was wearing a dark T-shirt and old dark colored trousers. He lives at 6615 Tarzana Street, North Hollywood, California with his wife ERIN. He can be further identified by: Los Angeles PD #572811-R, MS #557-60-7811, and Calif. DL #K-359783.

The driver of the defendant 1963 Chevrolet Corvair, California license NSX-687, has not yet been identified. He is a negro male, about 5'7" tall, weight about 155 to 160 pounds, with short black hair. At the time of the purchase, he was wearing a light colored pull-over shirt and dark trousers.

14. DESCRIPTION OF VEHICLE:

1962 Chevrolet Nova, California license TRD-613, is registered to Ervin Andris FAZIER at 12015 Resonit, San Fernando, Calif. It is a white, hardtop, 2-door, 4-cup.

1963 Chevrolet Corvair, California license NSX-687, is registered to Cynthia Heflin at 1521 S. Broadway, Los Angeles, Calif. It is a blue, 2-door, 4-cup.



APPENDIX



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TITLE 26  
UNITED STATES CODE

PART II---MARIHUANA

Subpart A--Tax on Transfers  
(Sections 4741 through 4746)

#4741. IMPOSITION OF TAX

(a) Rate...There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

- (1) Transfers to special taxpayers.--Upon each transfer to any person who has paid the special tax and registered under #s4751-4753..\$1 per oz. or marihuana or fraction thereof.  
(2) Transfers to others.--Upon each transfer to any person who has not paid the special tax and registered under #s4751 to 4753..\$100 per oz...

(b) By Whom Paid...Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of #4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

#4742. ORDER FORMS

(a) General Requirement...It shall be unlawful for any person WHETHER OR NOT required to pay a special tax and register under #s4751 to 4753..to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) Exceptions (not applicable)

(c) SUPPLY...The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary...,but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary...shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

(d) PRESERVATION. Each such order form sold by the Secretary ...shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by



1 such person for a period of 2 years so as to be readily ac-  
2 cessible for inspection by an officer or employee mentioned  
3 in Section 4773. The copy given to the purchaser shall be  
4 retained by the purchaser and preserved for a period of 2  
years so as to be readily accessible to inspection by any  
officer or employee mentioned in section 4773. The second  
copy shall be preserved in the records of the internal  
revenue district.

5 #4743. AFFIXING OF STAMPS.

6 #4744. UNLAWFUL POSSESSION.

7 (a) Persons in general...It shall be unlawful for any person  
8 who is a transferee required to pay the transfer tax im-  
posed by #4741(a)...(1) to acquire or otherwise obtain any  
9 marihuana without having paid such tax, or (2) to transport  
or conceal, or in any manner facilitate the transportation  
or concealment of, any marihuana so acquired or obtained.  
10 Proof that any person shall have had in his possession any  
marihuana and shall have failed, after reasonable notice and  
11 demand by the Secretary or his delegate, to produce the order  
form required by #4742 to be retained by him shall be pre-  
12 sumptive evidence of guilt under this subsection and of li-  
ability for the tax imposed by #4741(a).

13 #4745. FORFEITURES.

14 #4746. CROSS REFERENCES: For penalties and other general  
15 and administrative provisions applicable to this subpart,  
see #s 4761-2; #s 4771 to 4776, inclusive, and subtitle F.

16 SUBPART B...OCCUPATIONAL TAX

17 #4751...Imposition of tax.

18 #4752...Computation and liability for tax.

19 #4753...Registration.

20 #4754...Returns.

21 #4755...Unlawful acts in case of failure to register and pay  
special tax.

22 #4756...Other laws applicable.

23 #4757...Cross references.

24 SUBPART C...GENERAL PROVISIONS

25 #4761...Definitions.

26 #4762...Administration in insular possession.

PART III...MISCELLANEOUS PROVISIONS  
RELATION TO NARCOTIC DRUGS AND  
MARIHUANA

#4771...Stamps

#4772...Exemption from tax and registration.



1 #4773. INSPECTION OF RETURNS, ORDER FORMS, AND PRESCRIPTIONS.  
2 The duplicate order forms and the prescriptions, including  
3 the written record of oral prescriptions, required to be  
4 preserved under the provisions of #4705(c) (2) and (e), and  
5 the order forms and copies thereof and the prescriptions and  
6 records required to be preserved under the provisions of  
7 section 4742, in addition to the statement or returns filed  
8 in the office of the official in charge of the internal  
9 revenue district under the provisions of #s4732(b) or 4754,  
10 shall be open to inspection by officers and employees of the  
11 Treasury Department duly authorized for that purpose, and  
12 such officials of any State or Territory, or of any organized  
13 municipality therein, or of the District of Columbia, or any  
14 insular possession of the United States, as shall be charged  
15 with the enforcement of any law or municipal ordinance regu-  
lating the production of marihuana or regulating, the sale,  
prescribing, dispensing, dealing in, or distribution of  
narcotic drugs or marihuana. The Secretary or his delegate  
is authorized to furnish, upon written request, certified  
copies of any of the said statements or returns filed in the  
office of any official in charge of an internal revenue  
district to any of such officials of any State or Territory  
or organized municipality therein, or the District of Col-  
umbia, or any insular possession of the United States as  
shall be entitled to inspect the said statements or returns  
filed in the office of the official in charge of the inter-  
nal revenue district, upon the payment of a fee of \$1 for  
each 100 words or fraction thereof in the copy or copies so  
requested.

16 #4774. Territorial extent of law.

17 #4775. List of special taxpayers.

18 - - - - -

19 FEDERAL TAX REGULATIONS 1968

20 Subpart D--Transfer Taxes

21 #152.66 WRITTEN ORDER REQUIRED FOR TRANSFER OF MARIHUANA.  
22 Except as otherwise provided, every person seeking to obtain  
23 marihuana shall make application on Form 679a(Marihuana) to  
24 the district director of internal revenue for the district  
in which the transferee is located for the purchase of an  
order form. The application shall show (a) the transferee's  
name, address, and, if registered, the registration number,  
(b) the name and address of the transferor, and (c) a de-  
scription, including quantities, of the desired articles or  
materials to be transferred. The application must be ac-  
companied by a check, cash, or money order in payment of the  
transfer tax..plus 2 cents in payment for the order form.



1 #152.69 PROCEDURE REGARDING ORDER FORMS

2 Upon receipt of a properly executed application, accompanied  
3 by a sum sufficient to cover the transfer tax and the price  
4 of the order form, the district director will issue the order  
5 form in triplicate. There shall be shown on each of the  
6 three copies the date of issuance, the name and address of  
7 the proposed transferor, the name and address of the trans-  
8 feree, and a description, including quantities, of the desired  
9 articles or materials. As to affixing of the tax stamp to  
10 the original order form, see #152.64. The duplicate and  
triplicate shall show the date the stamp was purchased and  
canceled. The original and duplicate shall be delivered  
to the transferee, who shall in turn submit the original to  
the transferor. The triplicate shall be retained by the  
district director. The transferor shall preserve the origi-  
nal, and the transferee shall preserve the duplicate, for  
a period of 2 years so as to be readily accessible for  
inspection by any officer, agent, or employee mentioned in  
section 4773.

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N.O. 22784

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DENNIS FRAZIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

JUL 5 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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## TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
APPELLEE'S BRIEF .	1
I JURISDICTIONAL STATEMENT.	1
II STATUTES INVOLVED.	2
III QUESTIONS PRESENTED.	3
IV STATEMENT OF FACTS.	4
V ARGUMENT.	8
A. (1) DEFENDANT'S PRIVILEGE AGAINST SELF INCRIMIN- ATION WAS NOT VIOLATED BY REASON OF HIS CONVIC- TION FOR FAILURE TO COM- PLY WITH THE REQUIREMENTS OF THE MARIJUANA TAX SYSTEM.	8
(2) IT IS UNNECESSARY TO CON- SIDER THE VALIDITY OF THE CONVICTION AS TO COUNT THREE.	17
B. DEFENDANT'S CONVICTION WAS NOT OBTAINED BY IMPERMISSIBLE EN- TRAPMENT.	18
C. (1) THE COURT PROPERLY IN- STRUCTED THE JURY AS TO THE QUANTUM OF PROOF WITH REFERENCE TO THE DEFENSE OF ILLEGAL ENTRAPMENT.	25
(2) IT IS NOT ERROR TO SUBMIT THE QUESTION OF ENTRAPMENT TO THE JURY.	25



D. THERE WAS NOT AN UNREASONABLE  
LAPSE OF TIME FROM THE DATE OF  
TRANSACTION IN ISSUE UNTIL THE  
DATE OF ARREST SO AS TO VIOLATE  
THE APPELLANT'S CONSTITUTIONAL  
RIGHTS.

27

VI CONCLUSION.

31



## TABLE OF AUTHORITIES

	<u>Page</u>
Albertson v. S. A. C. B., 382 U. S. 70 (1965)	8
Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962)	23
Bech v. United States, 298 F. 2d 622 (9th Cir. 1962)	17
Brothers v. United States, 328 F. 2d 151 (9th Cir. 1964)	23
Celleno v. United States, 276 F. 2d 941 (9th Cir. 1960)	23
Espinosa v. United States, 317 F. 2d 275 (9th Cir. 1963)	23
Grosso v. United States, 390 U. S. 62 (1968)	8, 15
Haynes v. United States, 390 U. S. 85 (1968)	8, 15
Marchetti v. United States, 390 U. S. 39 (1968)	8, 15
Mooreman v. United States, 220 F. 2d 589 (5th Cir. 1955)	24
Nigro v. United States, 276 U. S. 332 (1928)	14
Noah v. United States, 304 F. 2d 317 (9th Cir. 1962)	17
Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966)	4, 27
Pacific Coast European Conference v. F. M. C., 126 U. S. App. D. C. 230, 376 F. 2d 785 (1967)	14
Russell v. United States, 288 F. 2d 520 (9th Cir. 1961)	17



Page

Sherman v. United States, 320 F. 2d 137 (9th Cir. 1963)	17
Sherman v. United States, 356 U.S. 369 (1958)	18, 20, 21
Slade v. United States, 267 F. 2d 834 (5th Cir. 1959)	24
Smith v. United States, 106 U.S. App. D.C. 26, 269 F. 2d 217, cert. denied 361 U.S. 865 (1959)	15
Sorrelis v. United States, 287 U.S. 435 (1932)	18
Udall v. Tallman, 380 U.S. 1 (1965)	13
United States v. Doremus, 249 U.S. 86 (1919)	13, 14
United States v. Fisher, 353 F. 2d 396 (5th Cir. 1965)	14
United States v. Hammond, 360 F. 2d 688 (2nd Cir. 1966)	28
United States v. Kahaner, 317 F. 2d 459 (5th Cir. 1959)	24
United States v. Sanchez, 340 U.S. 42 (1950)	14

Constitution

United States Constitution:

Tenth Amendment	14
-----------------	----

Statutes

26 Code of Federal Regulations:

§151.24	13
§151.42 (1967)	13



## 26 Code of Federal Regulations:

§152.23 (1967)	12
§152.67	12
§152.68	12

## Title 18 United States Code:

§3231	2
-------	---

## Title 21 United States Code:

§176(a)	2
---------	---

## Title 25 United States Code:

§4742(a)	3
----------	---

## Title 26 United States Code:

§4705(g)	13
----------	----

§4741 et seq.	8, 10
---------------	-------

§4742(a)	2, 10, 16
----------	-----------

§4743	13
-------	----

§4771(a)(1)	13
-------------	----

§4775	12
-------	----

§6107	12
-------	----

§7273(b)	3
----------	---

## Title 28 United States Code:

§1291	2
-------	---

§1294	2
-------	---



<u>Miscellaneous</u>	<u>Page</u>
Harrison Act	13, 14
Marijuana Tax Act	8, 9, 13, 14, 15, 16
Marijuana Tax System	3, 8
Uniform Narcotic Drug Act	11
H. R. Rep. No. 792, 75th Cong., 1st sess. 1 (1937)	9, 10
S. Rep. No. 900, 75th Cong., 1st sess. 2 (1937)	9, 10



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APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

On October 4, 1967, a three count indictment was returned against the defendant, Dennis Frazier, by the Federal Grand Jury for the Central District of California [C. T. 2]. <sup>1/</sup>

The indictment charged the defendant with the violation of Federal laws relating to the possession and sale of marihuana.

The defendant was found guilty on all three counts by a jury verdict on December 6, 1967.

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1/ "C. T." refers to Clerk's Transcript.



On January 8, 1968, the defendant was sentenced to the custody of the Attorney General for five years on each of the three counts, with the sentences to run concurrently [C. T. 19].

Defendant's Notice of Appeal was timely filed [C. T. 20]. The jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231; Title 21, United States Code, Section 176(a); and Title 26, United States Code, Section 4742(a). This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTES INVOLVED

Title 21, United States Code, Section 176a provides in pertinent part as follows:

"Whoever, knowingly, with intent to defraud the United States, receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20, 000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have had the



marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Title 25, United States Code, Section 4742(a) provides in pertinent part as follows:

"It shall be unlawful for any person . . . to transfer marijuana, except in pursuance of a written order of the person to whom such marijuana is transferred, on a form to be issued for that purpose by the Secretary or his delegate."

Title 26, United States Code, Section 7273(b) provides in pertinent part as follows:

"Whoever commits an offense . . . described in . . . section 4742(a) shall be imprisoned not less than five years or more than 20 years, and in addition, may be fined not more than \$20, 000."

### III

#### QUESTIONS PRESENTED

A. Was defendant's privilege against self-incrimination violated by reason of his conviction for failure to comply with the requirements of the Marijuana Tax System?



B. Was defendant's conviction obtained by impermissible entrapment as a matter of law?

C. 1. Did the trial court commit plain error in instructing the jury as to the quantum of proof in relation to the defense of illegal entrapment where the court's instruction was based on the case of Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966)?

2. Is entrapment an issue for the court rather than for the jury to decide?

D. Is the time period from July 28, 1967 (date of the transaction which led to counts one, two and three) to September 13, 1967 (date of arrest) a sufficient lapse so as to violate the defendant's fifth amendment rights?

#### IV

#### STATEMENT OF FACTS

In June, 1967, Roger Knapp was an agent with the Federal Bureau of Narcotics [R. T. 52]. <sup>2/</sup>

On or about June 10, 1967, one Craig Lasha, a special employee of the Bureau of Narcotics, introduced Agent Knapp to the defendant, Dennis Frazier. The introduction took place at a special gathering at the residence of the defendant [R. T. 53]. Agent Knapp asked the defendant if he could purchase some

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2/ "R. T." refers to Reporter's Transcript.



narcotics from him. The defendant said that he could. Agent Knapp requested the defendant's phone number which the defendant wrote down and gave to Knapp [R. T. 54].

On June 26, 1967, Agent Knapp phoned the defendant and inquired as to the purchase of five kilograms of marijuana. The defendant said he thought he could get them but would have to make a few phone calls. It was agreed that Knapp would call back on the 28th [R. T. 55].

On June 28th, Knapp called the defendant and asked if he could purchase the marijuana from the defendant that evening. The defendant related that he was ready and it was agreed that Knapp would meet the defendant at his residence that evening [R. T. 56].

Knapp arrived at the defendant's house that evening and upon his arrival was met by the defendant. Knapp asked if everything was all right for the purchase and the defendant replied that it was and then asked Knapp to go into his house with him since he had to call his source of supply and let him know they were on the way [R. T. 56, 57]. Both men then entered the defendant's house where the defendant made a phone call. About a half hour later, Knapp and the appellant drove off in the appellant's automobile.

Charles Henry, agent with the Federal Bureau of Narcotics was present in the area of the defendant's house on the evening of the 28th in a surveillance capacity. Agent Henry observed Knapp arrive at the defendant's residence and further observed the defendant meet Knapp alongside Knapp's auto and saw both men



enter the defendant's house [R. T. 87, 88].

The defendant and Knapp proceeded (under Agent Henry's surveillance) to the intersection of Cochran and Dockweiler Streets in Los Angeles where the defendant parked and told Knapp to wait while he checked to see if everything was all right. The defendant then walked away [R. T. 57] and was observed to walk into an apartment complex [R. T. 88]. A few moments later the defendant returned and related to Knapp that his source did not want to meet Knapp and therefore the defendant requested the money from Knapp. During this conversation, an unidentified Negro was observed to get into a Corvair automobile which was parked in front of the defendant's car [R. T. 57].

Knapp gave the defendant the money and the defendant was observed to get into the Corvair with the unidentified male and drove off [R. T. 58, 89].

At approximately 10:00 P. M., the Corvair was observed to return to the area and the defendant was observed to exit the Corvair with a brown bag in his hands and to proceed to his own vehicle in which Knapp was still sitting. The defendant got into his own auto and placed the bag, which had the name Britt on it, in the rear seat of his car and the defendant and Knapp then drove back to the defendant's house [R. T. 58, 59, 90]. When they arrived in front of the defendant's house Knapp inspected in the defendant's presence, the contents of the "Britt" bag and counted out the five brick-shaped objects in the bag [R. T. 59]. Knapp then placed the bag in his government vehicle which was parked across



the street and then went with the defendant into the defendant's house [R. T. 59, 90].

While in the defendant's house, the defendant complained that he had not made enough out of the transaction to justify the amount of traveling he did. The defendant further stated he was rather unhappy with the amount he received [R. T. 60]. At no time during the transfer, or at any other time, did the defendant request of Knapp an order on a form issued for that purpose by the Secretary of Treasury [R. T. 63, 64].

After leaving the defendant's house that evening, Knapp proceeded to the Los Angeles Office of the Federal Bureau of Narcotics where in the presence of Agent Henry, he dated and initialed each of the five brick-shaped objects as well as the Britt bag. All these items were then locked up until the following morning when Knapp delivered them to the Los Angeles Sheriff's Office Chemist [R. T. 61].

The Britt bag as well as the five brick-shaped objects were admitted into evidence as Government's Exhibit No. 1 [R. T. 63]. A stipulation was entered into between the plaintiff and defendant that the five bricks involved in this case, compressed plant material and seed, which has a total weight of approximately 1,000 grams, has been identified as Cannabis sativa, or marijuana; . . . ." The bricks were analyzed by Mr. Kayne who is a chemist employed by the Los Angeles County Sheriff's Department [R. T. 501].



ARGUMENT

A.

- (1) DEFENDANT'S PRIVILEGE AGAINST SELF INCRIMINATION WAS NOT VIOLATED BY REASON OF HIS CONVICTION FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE MARIHUANA TAX SYSTEM.
- 

The defendant asserts that the requirements of the Marihuana Tax statutes as set out in Title 26, United States Code, Sections 4741 through 4775 provide incriminatory information and therefore violate his privilege against self-incrimination. The defendant is relying almost entirely on three recent Supreme Court decisions:

- Marchetti v. United States, 390 U.S. 39 (1968);  
Grosso v. United States, 390 U.S. 62 (1968);  
Haynes v. United States, 390 U.S. 85 (1968).

The Marchetti and Grosso cases are concerned with gambling while the Haynes case is concerned with firearms. In both of these types of cases the obligations under the registration statutes with which the individuals were charged with having failed to comply, created a real and appreciable risk of incrimination. Marchetti v. United States, supra, at 48. Further the Supreme Court stated in Albertson v. S. A. C. B., 382 U.S. 70, 79 (1965) that registration provisions compelling disclosure of incriminating information contravene the Fifth Amendment when the requirements



are directed at a highly selective group inherently suspect of criminal activities.

The Marihuana Tax Act can easily be distinguished. The Federal Marihuana controls are aimed primarily at the regulation of the legitimate market in marihuana and apply only to activities which are otherwise lawful. Those who cannot deal in marihuana lawfully under local law cannot seek or obtain tax-paid order forms from the federal government, and thus those who are permitted to comply with this act cannot, by definition, be incriminating themselves.

The Marihuana Tax Act of 1937 was intended to raise revenue through occupational and transfer taxes on the trade in marihuana while at the same time discouraging the widespread use of the drug by smokers and addicts.

S. Rep. No. 900, 75th Cong. 1st Sess. 2 (1937)

(hereafter "S. Rep."); H. R. Rep. No. 792, 75th Cong. 1st Sess. 1 (1937) (hereafter "H. Rep.").

Congress therefore was careful to distinguish in its control provisions between the socially-acceptable market for marihuana and the illicit traffic in the drug. The Senate Committee explained (S. Rep. p. 3):

" \* \* \* the bill is designed, through the occupational tax and the order form procedure, to publicize legitimate dealings in marihuana and through the \$100 transfer tax to prevent the drug



from coming into the hands of those who will put it to illicit uses." [Emphasis added].

The House Committee agreed (H. Rep. p. 2):

"All legitimate handlers of marihuana are required to pay occupational taxes \* \* \*.

"These persons, in addition to paying the occupational tax, must register with the collector of internal revenue and file information returns as to their dealings in marihuana." [Emphasis added].

Both committees explained that the \$100 per ounce transfer tax, backed by criminal sanction, would be applicable to unregistered transferees, "who under ordinary circumstances will be illicit users of marihuana." (S. Rep. p. 3; H. Rep. p. 2).

Section 4741 imposes a transfer tax on all transfers of marihuana (with a few irrelevant exceptions), whether or not to a person who has registered and paid the occupational tax, and the amount of the tax depends on whether or not the transferee has registered. Thus, it is undeniable that Congress did contemplate that its transfer tax would reach unregistered individuals, whom it foresaw as those without a justifiable purpose for dealing in the drug.

Section 4742(a), which the defendant was found to have violated, makes it criminal "for any person", whether or not required to register and pay the occupational tax, to transfer



marihuana, "except in pursuant of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

These above quoted provisions indicate that Congress in 1937 contemplated that there could be authorized transfers to persons who were not in the categories of required registrants. But this is completely consistent with the construction of the Act which we regard as the only one designed to achieve its announced purposes, for in 1937 about one-fifth of the states still had no meaningful narcotics laws governing the acquisition of this drug. Thus, when Congress acted, it would have been possible for a non-Registrable individual to make purchases of marihuana -- lawfully -- in those states if he was willing to pay the \$100 per ounce tax designed to discourage just such dangerous ventures. And we have no doubt that such an individual could have insisted that he be issued a blank order form with which to consummate his lawful transaction.

Since that enactment, however, all states and the District of Columbia have adopted comprehensive controls based on the Uniform Narcotic Drug Act, limiting marihuana dealings to defined categories of professionals with some justifiable reason for handling the drug. Hence, the small group of unregistered persons who in 1937 could have engaged in marihuana transactions lawfully under local law and thus have obtained an order form from the federal government to sanction the transfer has now disappeared. Thus, in practical fact, there is and can be now no collection of the



transfer tax before the transfer occurs from, and no issuance of an order form to, anyone who is not registered as lawfully entitled to deal in marihuana. 3/ This situation -- which precludes the possibility of any clash with the privilege against self-incrimination -- is underscored by virtue of the implementing regulations issued by the Commissioner of Internal Revenue and the Commissioner of Narcotics. Responding to the altered legal climate that developed after 1937, these regulations now specify formally what was clearly the intent of Congress at the time this Act was passed. Thus, for any one desiring to be registered (26 C. F. R. §152.23 (1967)):

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

And one who is not registered cannot obtain an order form, 4/

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3/ Of course, this does not foreclose assessment of the tax upon an unregistered transferee who goes ahead and obtains marihuana without the legal right to do so.

4/ Although there is no specific provision which limits the dispensing of order forms, this limitation flows from 26 C. F. R. §§ 152.67 and 152.68, which require the signing of applications for order forms by the same person who signed the registration, with comparison of the two signatures by the district director before the order form may issue. It is important to note, too, that improper applications for order forms (including those which indicate that the applicant would not be operating legally under state law) are not disclosed to law enforcement agencies as are proper registrants under the provisions of 26 U. S. C. §§ 4775 and 6107. Such applications are apparently returned without being recorded.



and thus cannot pay the transfer tax which is evidenced by affixing tax stamps to the order form. 5/

These regulations reflect the consistent construction by the agencies charged with administering the Marihuana Tax Act (the Internal Revenue Service and the Bureau of Narcotics 6/) that this Act is to be interpreted as in pari materia with the Harrison Act explicitly declares what has been regarded as implicit in the Marihuana Act, for it provides that an individual may secure an order form for the acquisition of narcotics only for his "use, sale, or distribution \* \* \* in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." 26 U. S. C. §4705(g); see, also, 26 C. F. R. §§ 151.24, 151.42 (1967). 7/ Especially when coupled with the salutary rule that statutes will be construed to preserve their constitutionality and to avoid even a serious constitutional question, the reasonable and consistent administrative construction of the Marihuana Tax Act by the agency "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new", should be respected. Udall v. Tallman, 380 U. S. 1, 16 (1965). As this Court observed recently, where an administrative rule does not transgress the authority under which it is issued, "it is still the statute which

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5/ See 26 U. S. C. §§ 4743, 4771(a)(1).

6/ Now the Bureau of Narcotics and Drug Abuse, of the Department of Justice.

7/ See United States v. Doremus, 249 U. S. 86, 92 (1919).



speaks, and rule and statute may not be separated into alien elements \* \* \*." Pacific Coast European Conference v. F. M. C., 126 U. S. App. D. C. 230, 235, 376 F. 2d 785, 790 (1967). And this respect for administrative interpretation applies with equal force and justification to the provisions of regulatory tax statutes. See United States v. Fisher, 353 F. 2d 396, 397-398 (5th Cir. 1965).

The administrative interpretation that these statutes do not contemplate registration by or issuance of order forms to those engaged in activities illegal under local law has long been recognized and sustained. In Nigro v. United States, 276 U. S. 332, 345 (1928), the Court correctly viewed the objective of the order form provisions of the Harrison Act as effecting "a kind of registration of lawful purchasers, in addition to one of lawful sellers \* \* \*." Chief Justice Taft, for the Court, continued: "the order form is not a mere record of a past transaction -- it is a certificate of legality of the transaction being carried on \* \* \*." 276 U. S. at 351. <sup>8/</sup> The Marihuana Tax Act was before the Supreme Court in United States v. Sanchez, 340 U. S. 42, 44

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8/ The Court expressly rejected the argument advanced by appellant (Brief, p. 41) that making it a federal crime to deal without using the order form, while making it impossible for unregistered persons to obtain such a form, exceeds the taxing power of Congress and violates the Tenth Amendment. Since the order form requirement tends to keep transactions in regulated drugs above-board and to confine such transactions to registered dealers readily amendable to tax collection, insistence on order forms, even while denying them to certain classes of individuals, is "genuinely calculated to sustain the revenue features." 276 U. S. at 351-354. Accord, United States v. Doremus, 249 U. S. 86, 93-94 (1919).



(1950), and the Court sustained the validity of a prohibitive tax on unregistered transferees because of the indisputable "congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels." This Court in Smith v. United States, 106 U. S. App. D. C. 26, 29, 269 F. 2d 217, 220, cert. denied, 361 U. S. 865 (1959), recognized the same congressional plan and purpose.

Thus, in light of the way the Marihuana Tax Act has been construed and applied, there is no conceivable inconsistency with the privilege against self-incrimination. Only those persons who can demonstrate that their activities would be lawful under local law are required -- and only they are permitted -- to make any disclosure of information. And by hypothesis, there can in such a situation be no "real and appreciable" risk of incrimination. Individuals in appellant's position, who carry on transactions in marihuana in contravention of local law are not only not expected to register or obtain an order form or prepay the transfer tax; they will not be allowed to do so. Unlike the individuals before the Supreme Court in the wagering and firearms tax cases, Marchetti, Grosso, and Haynes, supra, defendant was not charged with failure to register or pay a tax, which would have incriminated him had he complied. Rather defendant stands convicted of violations which have nothing whatsoever to do with the privilege against self-incrimination. As enacted and applied, the Marihuana Tax Act forbids transactions that are not authorized by compliance with federal prerequisites. Defendant engaged in a course of



conduct for which he had no authority, and in this way exposed himself to criminal sanction. It is irrelevant that he could not have obtained the authority -- by risking incrimination under local law -- which would have legitimated his dealings under the Marihuana Act, for Congress has chosen to outlaw the black market in marihuana conducted by persons who are not within any of the classes specified for lawful business in this drug. This case is essentially indistinguishable from prosecution of a person who practices law or medicine without a license or operates an omnibus without a certificate of public convenience and necessity. It would certainly be no defense to such a prosecution that the individual did not and could not meet the standards and prerequisites for permission to engage in such callings lawfully. Once he proceeds to perform services or activities that only those who have satisfied the prerequisites of the law may engage in, he becomes liable to conviction and punishment. So has the defendant. 9/

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9/ In any event, under any conceivable construction of the Marihuana Tax Act, there is no possible self-incrimination problem, much less a real and appreciable risk of incrimination. Section 4742(a) does not require the disclosure of information by a transferor or punish non-disclosure. The defendant was merely obliged by that section to insist that the intended transferee furnish him with the required order form before he sold him marihuana. The failure to perform this statutory duty to refrain from transferring marihuana except in pursuant of a written order from the transferee -- the performance of which would have resulted in non-disclosure of information -- was the crime for which the defendant was convicted. No values protected by the privilege against self-incrimination are affected by the restriction on activity enforced by this conviction.



- (2) IT IS UNNECESSARY TO CONSIDER THE VALIDITY OF THE CONVICTION AS TO COUNT THREE.
- 

Where a defendant is sentenced to the same period of incarceration on more than one count and the sentences are to run concurrently, the fact that the appellant was validly convicted on any one count precludes reversal regardless of the validity of the convictions on the other counts.

Sherman v. United States, 320 F.2d 137, 156

(9th Cir. 1963);

Noah v. United States, 304 F.2d 317, 318

(9th Cir. 1962);

Bech v. United States, 298 F.2d 622, 626

(9th Cir. 1962);

Russell v. United States, 288 F.2d 520, 521

(9th Cir. 1961).

In the instant case, the defendant upon his conviction on Counts One, Two and Three was sentenced to the custody of the Attorney General for five years on each count with the sentences to run concurrently. Since the defendant was validly and properly convicted as to Counts One, and Two, a reversal as to Count Three (charging a violation of Title 26, United States Code, §4742a) is precluded regardless of its validity.



B. DEFENDANT'S CONVICTION WAS NOT  
OBTAINED BY IMPERMISSIBLE ENTRAP-  
MENT.

---

The defendant cites several leading cases which relate to the subject of entrapment.

Sherman v. United States, 356 U. S. 369 (1958);

Sorrelis v. United States, 287 U. S. 435 (1932).

The defendant further refers to several cases with regard to the rationale of the defense of entrapment. More precisely the issue with regard to entrapment is: (a) Whether the Government (i. e. . . . officials of the Government) implanted "in the mind of an innocent person the disposition to commit the alleged offense and" . . . induced . . . "its commission in order that they may prosecute", or (b) Whether the ". . . Government agents merely afforded opportunities or facilities for the commission of the offense . . .". The former and not the latter constitute impermissible entrapment.

Sherman v. United States, supra at 372.

The defendant contends that entrapment as a matter of law was established based on the testimony of Agent Knapp. In response to various questions the following wording was used by Agent Knapp in his answers: ". . . I asked Mr. Frazier if he could purchase some narcotics for me. He claimed he could. I then asked him for his telephone number. He wrote it down on a small card and gave it to me. And I told him I would contact him later." [R. T. 54]. It is to be pointed out that the word "narcotic"



is commonly used by agents of the Federal Bureau of Narcotics when the agents are operating in an undercover capacity. When so used the meaning of the word "narcotics" includes marijuana as well as heroin.

"On June 26th I made a telephone call from the undercover telephone in the Los Angeles Bureau of Narcotics office . . ." [R. T. 54].

"Then I asked him if I could purchase about five kilograms of marijuana from him. He said he thought he could get them, but he would have to make a few phone calls. We then agreed that I would call him back on the 28th to make more definite arrangements [R. T. 55].

When asked if he did in fact call the appellant on the 28th, Knapp replied:

"Yes sir, I did." [R. T. 55].

Further, Knapp related:

". . . I asked him if I could purchase the marijuana from him tonight. He said it was ready. And then we agreed that I should drive to his residence and meet him there at approximately 8:00 P. M." [R. T. 56].

Agent Knapp then stated:

"At about 8:00 P. M. I drove to his residence at 6615 Farmdale Street in North Hollywood. As I pulled up to the curb in front of his house, he was standing out on the front portion of his lawn. . ." [R. T. 56].

Based on these responses by Agent Knapp the defendant



draws the conclusion, with no authority, that this is sufficient to show the criminal act engaged in by the defendant originated with an officer of the Government.

The Government respectfully submits that the mere fact that the government officer asked defendant for his phone number, or requested of the defendant if the defendant could purchase marijuana or that the officer made a phone call or that the officer said "I did" . . . does not, under any authority, constitute impermissible entrapment. More precisely it more closely falls in the category of a government officer merely giving a man with a criminal disposition an opportunity to commit a crime. Sherman v. United States, supra, at 372. The evidence on this point is clear. Agent Knapp testified that at the time he first met the defendant, he asked the defendant if he could "purchase some narcotics for me". The defendant said he could. Knapp then asked the defendant for his phone number which the defendant wrote down and gave to Knapp [R. T. 53, 54]. Approximately two weeks later Knapp phoned the defendant and asked if he could purchase five kilograms of marijuana. The defendant replied he thought he could get them, but he would have to make a few phone calls [R. T. 55]. Knapp phoned the defendant two days later and asked if the purchase of marijuana could be made that evening and the defendant replied it was ready [R. T. 56]. After the transfer of marijuana, the defendant complained that he did not make enough money from the transaction and was unhappy with the amount he received [R. T. 60].

The government submits this is merely the giving of an



opportunity to commit a crime to a man with a criminal disposition, or as it was put in Sherman v. United States, supra at 372, "a trap for the unwary criminal". There is no evidence that the defendant was persuaded in any way by the officer to commit the offense or that the officer in any way "twisted the defendant's arm" to get the defendant involved in the commission of this offense. Again, there is absolutely no authority to the effect that the officers conduct in the instant case even approaches impermissible entrapment.

The defendant cites various "tricks" by the government agent which, it is contended, constituted impermissible entrapment. The defendant in his brief asserts that "One point is obvious: Defendant's car had a flat tire, and it was necessary to go to the gas station, fix the tire, return to the house, and mount it on the car before the Frazier car could be used. . . . This, of course, constitutes another of the entrapment devices used by Agent Knapp -- this one to bring about an element of the crime of transporting (i. e., tricking defendant into using his own car to transport the marijuana)."

However, there is nothing in the record to support this obvious point. There is no evidence to indicate that defendant's car had a flat tire or that defendant mounted a tire on his car. More importantly, there is no authority cited to the effect that fixing a flat tire constitutes impermissible entrapment.

Defendant further refers to an alleged inconsistency between the testimony of Agent Knapp and attachment to his brief



marked as Exhibit Two. It is to be pointed out that this particular exhibit is a copy of Agent Knapp's memorandum report and was not introduced as evidence in the trial. (It should also be pointed out that Exhibit One attached to defendant's brief likewise was not introduced into evidence.) The evidence that was adduced at the trial is clear.

On direct examination, Mr. Knapp testified that Frazier told him that the source of supply did not want to meet him [R. T. 57]. While Mr. Knapp was on cross-examination, the Government gave to the defendant a copy of Mr. Knapp's report [R. T. 77]. If there was any inconsistency or alleged inconsistency there was ample opportunity to bring this out on cross-examination. Obviously this was not done.

Both counsel for the defendant and Agent Knapp read the report. Thereafter, no question was posed by defendant's counsel relating to defendant's statement of the source not wanting to meet Knapp. It is clear that the report reflects merely a typographical error. Had defendant's counsel not been convinced of this himself he surely would have gone into the matter on cross-examination of Agent Knapp. Further, on re-direct examination, Mr. Knapp again testified, "Mr. Frazier told me that the unidentified male did not want to meet me" [R. T. 82].

The defendant also asserts that had he not been "required" to take the money to the source and had he not been "required" to take the marijuana from the source to the agent, he would not have violated the essential element of possession of marijuana.



Clearly, the evidence is sufficient to establish constructive possession on the part of the defendant even if there would not have been actual possession. The defendant negotiated with Mr. Knapp and it is apparent that all arrangements were made between defendant and his source. It was the defendant who knew where the transfer would take place [R. T. 57]. Defendant clearly demonstrated his ability to produce marihuana and thus even in the absence of physical possession, there was sufficient dominion and control to constitute possession.

Brothers v. United States, 328 F. 2d 151

(9th Cir. 1964);

Espinoza v. United States, 317 F. 2d 275

(9th Cir. 1963);

Arellanes v. United States, 302 F. 2d 603

(9th Cir. 1962);

Celleno v. United States, 276 F. 2d 941

(9th Cir. 1960).

A last trick asserted by defendant is that the "Government refused to put . . ." Mr. Craig Lasha, a special employee of the Bureau of Narcotics on the witness stand and therefore deprived defendant of the right to cross-examine Mr. Lasha. It is the defendant's contention, once again without authority, that this action indicates impermissible conduct and is entrapment as a matter of law.

It must be again pointed out that Mr. Lasha's only involvement in the instant case is that he introduced Agent Knapp



to the defendant [R. T. 52, 66]. The Government did not intend to call Mr. Lasha as a witness as it was felt he was not needed. Therefore, Mr. Lasha was not present in court at the outset of the defendant's trial. However, during the course of the trial, the appellant for the first time requested the presence of Mr. Lasha [R. T. 68-71]. Prior to the time at which the Government rested its case the court and the defendant were informed that Mr. Lasha was present and available to testify [R. T. 99].

Defendant's counsel acknowledged the fact that he was aware of Mr. Lasha's presence [R. T. 99] and further stated, ". . . I was mostly concerned about the name of the informer" [R. T. 100]. Subsequently, the defense rested without attempting to call as a witness Mr. Lasha who was present and available.

It is clear that where a party calls a hostile witness, the court may permit the party calling the witness to cross-examine and impeach him.

United States v. Kahaner, 317 F.2d 459

(5th Cir. 1959);

Slade v. United States, 267 F.2d 834

(5th Cir. 1959);

Mooreman v. United States, 220 F.2d 589

(5th Cir. 1955).

Therefore, nothing the Government did inhibited or precluded the defendant from calling Mr. Lasha as a witness. As a hostile witness, the defendant could have treated Mr. Lasha as if he was on cross-examination.



C. (1) THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE QUANTUM OF PROOF WITH REFERENCE TO THE DEFENSE OF ILLEGAL ENTRAPMENT.

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(2) IT IS NOT ERROR TO SUBMIT THE QUESTION OF ENTRAPMENT TO THE JURY.

---

The court gave the following instruction with reference to entrapment [R. T. 156-158].

"The law recognizes two kinds of entrapment: unlawful entrapment and lawful entrapment. Where a person has no previous intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person has the readiness and the willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but is lawful entrapment. When, for example, the Government has reasonable grounds for believing that a person is engaged in the illicit sale of marijuana, it is not unlawful entrapment for a Government agent to pretend to be someone else



and to offer, either directly or indirectly, to purchase narcotics -- marijuana in this case -- from the suspected person.

"If, then, the jury should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense or offenses involved in this case, if the jury should find that the accused was ready and willing to commit the crime such as charged in the indictment, whenever opportunity was offered, and that the Government agents did no more than offer an opportunity, the accused is not entitled to the defense of unlawful entrapment.

"If the accused had no previous interest or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of unlawful entrapment is a just defense and the jury should acquit the defendant.

"In this regard, if the jury should have any reasonable doubt from the evidence in the case as to whether the defendant was the victim of an unlawful entrapment, the jury should acquit the accused."



The authority for this instruction is Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966).

It is to be pointed out that this instruction was based on the appellate court decision in Notaro and is not the instruction given in the District Court in the Notaro case. The phrases defendant quotes from the Notaro case appear to refer to the instruction given by the District Court which was the basis for reversal in the appellate court. No authority has been cited which in any way indicates the instruction given in the instant case to be improper.

Defendant contends it is error to submit to the jury the question of whether the police conduct fell below standards and thus was an improper use of government power.

Once again there is no authority submitted to back up this contention.

Further, it is to be pointed out that the court did in fact rule on the issue of entrapment when the defendant moved the court for a judgment of acquittal. This motion was denied [R. T. 110].

D. THERE WAS NOT AN UNREASONABLE LAPSE OF TIME FROM THE DATE OF TRANSACTION IN ISSUE UNTIL THE DATE OF ARREST SO AS TO VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHTS.

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In the instant case, the defendant sold the marijuana to



Agent Knapp on June 28, 1967 and was arrested on September 13, 1967 [R. T. 72, 75]. Thus there was a time period of ten weeks from the commission of the offense to the date of arrest.

Even a fifteen month delay between an offense involving a violation of narcotic laws and arrest has been held not to violate any constitutional rights of an accused, in the absence of special circumstances which indicate the delay has resulted in prejudice to the accused.

United States v. Hammond, 360 F. 2d 688

(2nd Cir. 1966).

It is apparent therefore that the appellant has the burden to show how, in the instant case, the ten-week period from the date of the offense to the date of the arrest was of sufficient length to prejudice him to the extent of impairing constitutional rights.

The only basis for prejudice asserted by the defendant is in relation to the "unidentified male" as this individual was referred to by the prosecution witnesses. It should be pointed out that at no time during the trial did the defendant refer in any way to any prejudice in relation to this "unidentified man". The first time this issue was raised was in the defendant's brief.

Agent Knapp testified as to a conversation between himself and the defendant on June 28, 1967 in the vicinity of Dockweiler and Cochran Streets.

"Well during the conversation a young Negro male walked past us on the sidewalk and got into a blue Corvair which was parked immediately in front



of Mr. Frazier's car. Mr. Frazier and I finally came to agreement on the money. I gave him \$520 of the previously recorded Government money. He took the money and got in the passenger side of the Blue Corvair. Then the car drove west on Dockweiler and was out of sight.

"At about 10:00 P. M., the same blue Corvair pulled alongside of Mr. Frazier's car in which I was waiting and Mr. Frazier got out of the car. He carried a brown paper shopping bag. And he put the shopping bag behind the rear seat, behind the front driver's seat, and then got in the car." [R. T. 57, 58].

Earlier in the evening when Agent Knapp arrived at the defendant's house, Mr. Frazier stated that ". . . he had to call his source of supply and let him know that we are on the way". Agent Knapp's testimony also related that while in the defendant's apartment, Mr. Frazier did in fact place a phone call [R. T. 57].

While the "unidentified male Negro" was unidentified to the Government, he clearly was not unidentified to the defendant. The evidence is especially clear that the defendant entered a vehicle (empty handed) driven by the unidentified male and sometime later returned in the same vehicle driven by the same unidentified person. Upon his return, defendant carried the brown bag which contained the marijuana.



It is a most reasonable inference to make that the phone call the defendant made in his apartment, in the presence of Agent Knapp, was to this unidentified individual. It is also reasonable inference to make that the defendant was proceeding to this individual's residence to notify the "unidentified male" of his presence. Agent Henry saw defendant enter an apartment complex [R. T. 93]. Shortly thereafter, this unidentified individual was seen to enter the vehicle parked immediately in front of defendant's vehicle in which Agent Knapp was seated.

Clearly this man whom the Government refers to as an unidentified male Negro is not unidentified to the defendant. On the contrary, strong inferences can easily be drawn which lead to the conclusion than an association or partnership did in fact exist between this individual and the defendant. Therefore, it is apparent that defendant's contention of prejudice resulting from the ten week period from offense to arrest is completely without merit. Defendant has failed to show any prejudice of any sort.



CONCLUSION

For the foregoing reasons, it is respectfully submitted  
that the judgment of conviction of appellant Dennis Frazier should  
be affirmed.

Respectfully submitted,

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United States of America.



N O. 22731  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DENNIS FRAZIER,

Appellant,

vs.

JUL 24 1969

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S REPLY BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

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FILED

JUL 1 1969

WM. B. LUCK, CLERK



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DENNIS FRAZIER,

Appellant,

vs.

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APPELLANT'S REPLY BRIEF

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TOPICAL INDEX

Page

Table of Authorities	ii
APPELLANT'S REPLY BRIEF	1
I ARGUMENT	1
A. (1) re APPELLANT'S PRIVILEGE AGAINST SELF INCRIMINATION VIOLATED BY REASON OF HIS CONVICTION FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE MARIJUANA TAX SYSTEM.	1
(2) re NECESSITY TO CONSIDER THE VALIDITY OF THE CONVICTION AS TO COUNT THREE.	5
B. re CONVICTION OBTAINED BY IMPERMISSIBLE ENTRAPMENT.	6
C. (1) re COURT INSTRUCTIONS AS TO QUANTUM OF PROOF OF DEFENSE OF ILLEGAL ENTRAPMENT.	7
(2) re SUBMITTING THE QUESTION OF ENTRAPMENT TO THE JURY.	7
D. re UNREASONABLE PRE-ARREST DELAY AS VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.	8
II CONCLUSION	9



TABLE OF AUTHORITIES

Pac

Grosso v. United States, 19 L ed 2d 906, 390 US 62 (1968)	2-3-4-
Haynes v. United States, 19 L ed 2d 923, 390 US 85 (1968)	2-4-
Marchetti v. United States, 19 L ed 2d 889, 390 US 39 (1968)	2-3-4-
Nigro v. United States, 276 US 332	
Notaro v. United States 363 F.2d 169 (9th Cir. 1966)	
Robison v. United States, 379 F.2d 338 (9th Cir. 1967)	7-
Smith v. United States, 269 F.2d 217 (D.C.Cir. 1959)	
United States v. Doremus, 249 US 86 (1919)	
United States v. Sanchez, 340 US 42 (1950)	

Constitution

United States Constitution:

Fifth Amendment

Statutes

Title 26 United States Code:

#7011



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS FRAZIER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLANT'S REPLY BRIEF

---

TO THE CHIEF JUSTICE OF THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT, AND TO THE ASSOCIATE JUSTICES  
THEREOF, AND TO EACH OF THEM:

Appellant herein replies to the argument presented  
in appellee's brief:

I

ARGUMENT

A.

- (1) re APPELLANT'S PRIVILEGE AGAINST  
SELF INCRIMINATION VIOLATED BY  
REASON OF HIS CONVICTION FOR FAILURE  
TO COMPLY WITH THE REQUIREMENTS OF  
THE MARIHUANA TAX SYSTEM.
- 

Appellee has chosen to answer this argument lengthily  
(the brief is well over the maximum 20 pages) and authorita-  
tively, quoting cases decided in 1919, 1928, 1950, and 1959,<sup>1/</sup>

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<sup>1/</sup> U.S.v Doremus,249 US 86(1919); Nigro v US,276 US 332(1928);  
U.S.v Sanchez,340 US 42(1950); Smith v.US,269F2d 217(1959).



and stating in the opening paragraph of his brief (at page 8) that "The defendant is relying almost entirely on three recent Supreme Court decisions:

Marchetti v. United States, 390 U.S. 39 (1968);

Grosso v. United States, 390 U.S. 62 (1968);

Haynes v. United States, 390 U. S. 85 (1968)."

The defendant certainly is relying on these three recent Supreme Court decisions just quoted, and appellee's argument, with authorities cited long before these three cases were decided on January 29, 1968, is of no avail.

A careful reading of Marchetti, Grosso and Haynes shows the error in appellee's argument. For example, Marchetti, 19 L ed 2d 889, 895, states:

"The issue before us is not whether the United States may tax activities which a State or Congress has declared unlawful. The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation, and nothing that follows is intended to limit or diminish the vitality of those cases.

"The issue is instead whether the methods employed by Congress in the federal wagering tax statutes are, in this situation, consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment."



And from Marchetti at page 903:

"The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise.

"But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers."

Appellee argues that the defendant does not come under the registration requirements. But the Act has taken care of that by Title 26 USC #7011, as noted by Chief Justice Warren in Grosso, 19 L ed 2d 906, 921, in the only dissent among the nine Justices:

"...#7011 imposes a general registration requirement on all those liable for other special taxes."

It is to be noted that Exhibit One, attached to appellant's opening brief, proves in the letter to defendant from the Internal Revenue Service, that he is being penalized because "you are not registered under the Marihuana Tax Act".

And at page 904 of Marchetti, the Court further clarifies the real issue involved:

"The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities."



And at page 905, Marchetti:

"Nonetheless, we can only conclude, under the wagering tax system as presently written, that petitioner properly asserted the privilege against self-incrimination, and that his assertion should have provided a complete defense to this prosecution."

"We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

Appellee argues further that defendant's case is distinguishable from Marchetti, Grosso and Haynes, in that appellant failed to perform a statutory duty to refrain from transferring marihuana except in pursuance of a written order, and for this failure he became liable for conviction and punishment. There is no difference. Marchetti, Grosso, and Haynes also failed to perform a statutory duty, and for this failure were convicted.

Appellee refuses to incorporate into his logic that had the appellant performed that statutory duty and acquired the form, he would have been required to disclose information which would then be made available to law enforcement.

This is the ISSUE and the DECISION in Marchetti, Grosso, and Haynes - that where Congress has seen fit to tax an illegal



activity in any area permeated with criminal statutes, that the taxing may be permissible, but that the requirement of disclosure of any incriminating information which is then made available to law enforcement cannot be the basis of a conviction if the person properly raises his privilege against self-incrimination.

Appellant herein has raised his privilege against self-incrimination. The taxing system as enacted under the Marihuana Tax Act is in an area permeated with criminal statutes, and under the authority of Marchetti, Grosso and Haynes, appellant's conviction for non-compliance of a statute which would have forced disclosure of incriminating information available to law enforcement cannot stand.

---

(2) re NECESSITY TO CONSIDER THE  
VALIDITY OF THE CONVICTION AS  
TO COUNT THREE.

---

Appellee concedes that the conviction under Count Three might be determined invalid, then cites authorities which state a reversal is not necessary if defendant is validly convicted on counts other than the one in question, if sentences are concurrent.

Not necessary to reverse, true; however, the rulings do not say the counts cannot be reversed. The Court is empowered to reverse, particularly if it is determined that the weight of the testimony anent Count Three unduly prejudiced the jury's determinations on Counts One and Two.



B. re CONVICTION OBTAINED BY  
IMPERMISSIBLE ENTRAPMENT.

---

Appellant's opening brief stated in authoritative detail the argument re impermissible entrapment.

Appellee has seen fit to state his opinion as to the facts.

Appellee consistently accuses appellant of having "no authority", yet appellee makes statements such as:

...(at page 22)... "it is clear that the report reflects merely a typographical error", but there was no evidence introduced that it was a typographical error; appellee merely states it as a fact.

...(at page 20)... "Knapp then asked the defendant for his phone number which the defendant wrote down and gave to Knapp", yet there was no introduction into evidence of this vital piece of paper with defendant's handwriting thereon with an expert to prove same; appellee merely states it as a fact.

...(again, at page 20)... "defendant complained that he did not make enough money from the transaction and was unhappy with the amount he received", yet there was no evidence of any kind that the defendant received any money.

...(and at page 21)... "no evidence to indicate that defendant's car had a flat tire", appellee thus ignoring Agent Henry's testimony (T.92-93) that he observed



defendant pick up a tire and return to his car with that tire.

Appellant thus justifiably relies on the argument as presented in his opening brief, with the authorities cited, without repetition of same herein.

C.

(1) re COURT INSTRUCTIONS AS TO QUANTUM OF PROOF OF DEFENSE OF ILLEGAL ENTRAPMENT.

---

Appellee states at page 27, "The phrases defendant quotes from the Notaro case appear to refer to the instruction given by the District Court" instead of the ruling as given by the Appellate Court in the matter.

Referral to appellant's opening brief, pages 44-45, will reveal the exact quotations from the Ninth Circuit's appellate ruling in Notaro v. United States, 363 F2d 169 (9th Cir. 1966), complete with page numbers.

Appellant sees no reason to waste the Court's time by repeating same herein.

(2) re SUBMITTING THE QUESTION OF ENTRAPMENT TO THE JURY.

---

Appellee again uses his favorite expression ("no authority to argue the contention that the question of entrapment is an area for the Court and not the jury.

The authority cited in the opening brief is the NINTH CIRCUIT COURT OF APPEALS, in its opinion in ROBISON



V. UNITED STATES, 379 F2d 338 (9th Cir.1967), which stated clearly, succinctly, and certainly that the Court would readily certify to the (United States Supreme) Court the question whether the issue of entrapment should not always be decided by the court and never submitted to the jury, were the question RES INTEGRA.

Thus, the issue was made RES INTEGRA in appellant's opening brief, and it is upon this authority in Robison that appellant asks the Ninth Circuit Court to consider same.

---

D. re UNREASONABLE PRE-ARREST DELAY AS VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

---

Appellee demonstrates again the capacity to miss the point of the argument.

Authorities cited in appellant's opening brief prove that the amount of time elapsed is NOT the issue to be considered, but rather whether or not it is shown that, regardless of time, defendant suffered prejudice to the extent of being unable to properly defend himself.

Appellant has stated ample authority in his opening brief so that further citations herein would be repetitious and time-consuming for this Court.



CONCLUSION

For the reasons stated in appellant's opening brief, and the additional reasons stated herein, it is respectfully submitted that the judgments of conviction on three counts of appellant Dennis Frazier be reversed, remanded, or dismissed as indicated in the opening brief.

Respectfully submitted,  
M. SIGBERT CHARIG  
Attorney for Appellant



No. 22,786

IN THE

United States Court of Appeals  
For the Ninth Circuit

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OPERATING ENGINEERS LOCAL UNION No. 3,  
an unincorporated association, THE IN-  
TERNATIONAL UNION OF OPERATING EN-  
GINEERS, an unincorporated association,  
HAROLD L. BOWEN, JAMES F. CHURCH,  
P. H. McCARTHY, JR., et al.,  
vs.  
B. R. BURROUGHS,

*Appellants,*  
*Appellee.*

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Appeal from the United States District Court for  
the Northern District of California,  
Southern Division

APPELLANTS' OPENING BRIEF

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FILED

SOL. VALERIA

WILLIAM B. LUCK, CLERK



## **Subject Index**

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	Page
Jurisdiction .....	1
Statement of facts .....	2
Specification of errors .....	8
Summary of argument .....	10
Argument .....	13
Introduction .....	13
Error No. 1 .....	15
Error No. 2 .....	17
Error No. 3 .....	22
Errors Nos. 4 and 5 .....	24
Conclusion .....	31

## Table of Authorities Cited

Cases	Pages
Destroy v. American Guild of Variety Artists, 286 F 2d 75, cert. den. 366 US 929 .....	25, 30
Edsberg v. Local Union No. 12, International Union of Operating Engineers, 30 F 2d 785 (1962).....	24, 25, 28
Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley, 378 F 2d 738 .....	24, 30
Harris v. International Longshoremen's Ass'n, Local 1291, 321 F 2d 801 .....	30, 31
I.B.E.W. v. Gulf Power Co., 182 F Supp 950 (ND Fla 1960) .....	17
Mitchell v. Demario Jewelry, 361 US 288 (1960).....	17
Ryan v. International Brotherhood of Electrical Workers, 361 F 2d 942 .....	9, 11, 30, 31
Schauffler v. Local 830, 162 F Supp 1 (ED Pa 1958).....	17
Securities and Exchange Commission v. Torr, 87 F 2d 446	16
Statutes	
28 USC 1291 .....	2
29 USC 411(4) .....	10, 11, 23
29 USC 411(a)(4) .....	2, 9, 27
29 USC 481 et seq. .....	5
29 USC 482 .....	5, 11, 23, 29
29 USC 529 .....	2, 9, 23
49 USC 402(o) .....	1
49 USC 412 .....	2
49 USC 492(i) .....	1
Texts	
43 CJS 445 .....	16
51 CJS 824 .....	22
2 US Code Cong. & Adm. News 2235, 2437 (1959).....	17

No. 22,786

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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OPERATING ENGINEERS LOCAL UNION No. 3,  
an unincorporated association, THE IN-  
TERNATIONAL UNION OF OPERATING EN-  
GINEERS, an unincorporated association,  
HAROLD L. BOWEN, JAMES F. CHURCH,  
P. H. McCARTHY, JR., et al.,

*Appellants,*

vs.

B. R. BURROUGHS,

*Appellee.*

**Appeal from the United States District Court for  
the Northern District of California,  
Southern Division**

**APPELLANTS' OPENING BRIEF**

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**JURISDICTION**

Operating Engineers Local Union No. 3 (hereinafter called Local) and International Union of Operating Engineers (hereinafter called International) Appellants, are, and each of them is, a Labor Organization within the meaning of 49 USC 492(i). B. R. Burroughs, Appellee, is a member within the meaning of 49 USC 402(o) (R 1 and 2).

Jurisdiction is based on 49 USC 412, 49 USC 411 (a)(4) and 529 and under 28 USC 1291 from the final Order and Judgment made and entered by the District Court in this matter (R 222-223).

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#### **STATEMENT OF FACTS**

That the Local's territorial jurisdiction extends from and includes the Territory of Guam, State of Hawaii, Northern California, Northern Nevada, and the State of California with a membership of in excess of 3,100 (R 169-170).

That proceeding to elect Local Officers commenced in January, 1966 by publication of a Notice in the official paper of the Local mailed to all members, which notice was repeated in the February, 1966 edition.

That in accordance with the requirements of the By-Laws additional notices concerning the forthcoming election were published in the March, April, May, June and July, 1966 editions and mailed to all of the members.

That the notice in the July, 1966 issue specified, among other things, (a) that the ballots and return envelopes be mailed August 10, 1966, and (b) the Ballot Box, i.e. Post Office Box, to which the return envelopes were addressed would be opened at 10 A.M., August 26, 1966 for the first and last time (R 171-172).

That Burroughs actively participated in the affairs of the Union as follows:

He was:

1. a Dispatcher employed by the Local, 1946
2. a Business Representative employed by the Local, 1946-1952, and again 1955-1956 (R 173)
3. a By-Law Committeeman, 1959-1960
4. a Delegate to the International Convention, 1960—April
5. Defeated in election for office of Recording-Corresponding Secretary, 1960—November
6. Defeated in election for office of Business Manager, 1963
7. Defeated in election of Delegates to 1964 International Convention
8. Defeated for office of Trustee, 1966 (R 170-171).

That under date of December 12, 1965, Burroughs first raised objections to the conduct of the Local election by letter to the Local Business Manager (R 172) and thereafter by various letters to the Business Manager, the Election Committee, the Officers, District Executive Board Members and District Representatives, acting Executive Board Advisors, and Secretary of the Election Committee dated February 19, 1966, June 15, 1966, June 16, 1966, June 22, 1966, July 10, 1966, July 16, 1966, July 17, 1966, July 18, 1966, August 4, 1966, August 5, 1966, August 11, 1966 (R 121-168).

That it was not until June 18, 1966 that Burroughs appealed to the General President and General Ex-

ecutive Board of the International Union (R 132, R 175) receipt of which in Washington, D.C. was acknowledged under date of June 23, 1966 (R 140). That additional matter in support of Burroughs' Appeal was sent to the International subsequently, i.e. on June 22, 1966 (R 139), July 18, 1966 (R 153) and August 11, 1966 (R 164).

That Burroughs was fully aware of his right to appeal appears from the General President's Ruling on an appeal of Burroughs dated January 30, 1966 on another subject and a decision rendered on March 21, 1966, less than two months later (R 174).

That four (4) months from June 18, 1966 was October 18, 1966 (R 176).

That on August 23, 1966 three (3) days before the Ballot Box was to be opened and more than one month before the expiration of the four (4) month period, Burroughs filed as plaintiff in the Superior Court of the State of California in and for the County of San Joaquin a Complaint for Injunctive Relief numbered 88942 therein (R 176).

That the Complaint makes no reference to the use or attempted use by plaintiff of any internal remedies or any appeal to the International, and it does not allege that any internal remedies were not available or if available were futile or uncertain or that he would be unfairly treated (R 55-58).

That Burroughs obtained a Temporary Restraining Order replaced by Temporary Restraining Order which protected the integrity of the ballots (R 60-62).

That thereafter the Court issued its Memorandum Decision in which it held first that it had no jurisdiction by reason of 29 USC 482, secondly that the only relief for Burroughs was under Title IV (29 USC 481 et seq.) and then stated:

“A secondary reason why this action is premature is that the petitioner has not exhausted his internal union remedies prior to the court action.” (R 77)

That on the next day, September 9, 1966, Burroughs as plaintiff filed in the United States District Court for the Northern District of California, Northern Division, a complaint identical with that filed in the State Court and obtained a Temporary Restraining Order identical with that issued by the State Court on August 25, 1966 (R 52-59, R 81-83, R 86-89).

That on September 13, 1966 the District Court made the following Order:

“The Court Ordered that the temporary restraining Order heretofore issued herein, dis(s)olved, and the further hearing on this case continued to September 14th, 1966 for hearing.” (R 103)

and on September 14, 1966, the counting of the Ballots having been completed, the following order:

“The parties being present as heretofore, the further hearing in this case was resumed, and it appearing that the issue before the Court has now become moot, upon motion of counsel for the plaintiff, Ordered the proceedings herein terminated.” (R 104)

That Burroughs was charged by Appellant Bower:

"... with violating Article 3, paragraph (c), Article 24 of the Local Union By-laws and Article 17, Section 4 of the Constitution of the International Union of Operating Engineers

"On the 23rd day of August, 1966 he commenced a civil action against Operating Engineers Local Union No. 3 in the Superior Court of the State of California for the County of San Joaquin No. 88942 in which action he sought the following relief:

"1. That a temporary restraining order be issued forthwith enjoining the Defendants and each of them from further proceeding with the election schedule to be completed August 26, 1966 or from further interference with the rights of Plaintiffs under Section 411(a)(4) of the Act.

"2. That a preliminary injunction issue pending trial enjoining all such conduct.

"3. That a permanent injunction issue enjoining such conduct.

"4. That the conduct of Local 3's affairs be under the supervision of this Court or its appointed monitor until lawfully selected officers can be elected to Local 3.

"5. For reimbursement to plaintiffs of reasonably incurred legal fees;

"6. For costs of this action;

"7. For such other and further relief as the Court may deem proper;

without in the four (4) months next preceding commencement of the civil action or at any time having exhausted all or any remedies and reason-

able provisions for hearing and appeal within the organization." (R 10-11).

and charged by Appellant Church similarly but by reason of the action filed by Burroughs in the United States District Court in Sacramento, California (R 12-13).

That Burroughs was found guilty by secret ballot after trial on February 2, 1967 in Sacramento on the Church charge by a vote of 220 to 134 with 15 ballots unmarked and was fined an amount equal to the additional election expense caused by that lawsuit, i.e. \$3,499.08, plus the cost of defending that lawsuit, i.e. \$1,081.51 (R 27).

That Burroughs was found guilty by secret ballot after trial on February 6, 1967 in Stockton on the Bower Charge by a vote of 289 to 86 with 10 unmarked ballots and was fined an amount equal to the additional election expense caused by that lawsuit, i.e. \$1,674.96, plus the cost of defending that lawsuit, i.e. \$902.78 (R 27).

That plaintiff appealed and requested the waiver of payment of the fine pending appeal, the Local Union concurred in Burroughs' request, and the payment of the fine was waived pending appeal (R 28).

That on June 30, 1967 the International rendered its decision as follows:

"... it was regularly moved and seconded that the decisions of Local Union No. 3 and the penalties imposed by it against the appellant be upheld and affirmed but that the enforcement of

such penalties by Local Union No. 3 be stayed for a period of 3 years at which time the penalties shall be vacated, provided that the appellant does not within that period of time, directly or indirectly, take any action or support any action violative of Article XVIII (XVII), Section 4 of Constitution of the International Union, and provided further that should the appellant take or support any such action within such period of time, the penalties imposed by Local Union No. 3 shall immediately and automatically become operative and enforceable by Local Union No. 3. This motion was put to a vote and was unanimously carried" (R 20-21).

That thereafter the Defendant commenced this action.

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#### **SPECIFICATION OF ERRORS**

1. The District Court erred in that the relief granted by it to Burroughs had in fact been granted him by the International as a result of his appeal to the International (R 20-21), and it is nowhere alleged that the Local or International would fail to honor the International's decision.
2. The District Court erred in finding that the doctrine of "unclean hands" does not preclude plaintiff from obtaining relief (R 221).
3. That the District Court erred:
  - (a) In holding that good faith alone is a defense to a violation of Article XVII, Section 4, of the International Constitution (R 22) and also to the

extent it was an issue of fact which the Court found as the basis of its decision.

(b) In determining the issue of good faith contrary to the decision of the Local Union (R 3-4, R 27-28) since if "good faith" alone was a defense, its determination was for the trier of the facts, the Local Union, and since the conduct of the trials or either of them was not attacked in this proceeding, it could not be an issue here.

(c) In holding that Burroughs was with respect to the action in the District Court in Sacramento relieved of the obligation to comply with Article XVII, Section 4, of the International Constitution by 29 USC 411(a)(4), in view of the Memorandum Decision and Minute Order in the Stockton suit (R 71-79).

4. The District Court erred in finding that the discipline of plaintiff based upon the charges was and is in violation of Sections 101(a)(4) and 609 of the Labor-Management Reporting and Disclosure Act (29 USC 411(a)(4), 529) in that it limits the right of plaintiff to institute actions under said Act and disciplines a member for exercising rights to which he is entitled under said Act, and Article XVII, Section 4, of the Constitution of the International Union of Operating Engineers is in violation of said Act as applied to the facts as found by the District Court (R 221).

5. The District Court erred in basing its decision on *Ryan v. International Brotherhood of Electrical Workers*, 361 F 2d 942 (R 228).

**SUMMARY OF ARGUMENT**

1. The International suspended the imposition of all penalties so long as Burroughs did not violate Article XVII, Section 4 of the International's Constitution for three (3) years (R 21), at which time the suspension would be permanent.

The relief granted, when read in the light of the District Court's remarks, is the same as that granted by the District Court. Equity does not enjoin in the absence of a wrong to be prevented or cured.

2. Since the relief sought is equitable, the equitable doctrine of "unclean hands" is applicable. In addition that doctrine raises the question of Burroughs' "Good Faith" which was and is seriously disputed by the International and the Local. This question of fact was resolved by the District Court in favor of Burroughs. The existence of the question of fact precludes the determination of this matter by Summary Judgment.

3. Contrary to the expressed opinion of the District Court (R 257-259) :

(a) Good faith alone is no justification for failing to exhaust Internal Union Remedies. There must be a good faith attack on the Internal Intra-Union Remedy or in the manner of its administration since the Congressional purpose of 29 USC 411(4) first proviso was not to change existing law but to provide a certain remedy and to limit the time during which the Internal Intra-Union Remedies must be pursued.

(b) The correctness of the decision of the trier of the facts is not to be inquired into by the courts

absent an attack on the manner and form of the trial or on the triers of fact. Neither situation is involved in this action. There is no claim that Burroughs was not fairly tried.

(c) If good faith justified Burroughs' suit in the State Court in Stockton, and if he was lawfully entitled to have a Court determine whether he should first exhaust his Internal Intra-Union Remedy, he achieved that right in the Stockton suit. In that suit the Superior Court held it had no jurisdiction by reason of 29 USC 482, that such relief as Burroughs sought must be under 29 USC 482, and in any event that he had not exhausted his Internal Remedies.

Thus when Burroughs brought the action in the United States District Court in Sacramento, he had already had his day in Court; he had been told specifically how and under what statute he should proceed and that he should exhaust his Internal Intra-Union Remedies.

4. The erroneous findings depend for their validity, if any, on a misapprehension of fact and law.

5. The Court erred in following *Ryan v. International Brotherhood of Electrical Workers* (supra).

There is in 29 USC 411(4) a dual Congressional purpose, i.e., to provide the member with a remedy that was certain and to preserve the doctrine of exhaustion of Internal Remedies—the basic mistake in *Ryan*, i.e. in the language of the opinion—not the result—is that its language sacrifices one Congressional purpose to preserve another Congressional purpose.

Appellants believe that neither need be sacrificed to preserve the other and that the correct answer lies in carrying out both Congressional purposes.

Thus in those situations in which the member, in good faith, pleads a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies has no application, i.e. there is no certain remedy, or it is futile, or there is an alleged violation of due process or fair trial, the Congressional purpose of protecting the member's right to sue should protect the member from discipline whether he wins or loses. Such protection from discipline in that situation does not defeat the Congressional intent to preserve the doctrine of exhaustion of internal remedies but in fact enforces it.

However, in a situation in which the member does not plead or attempt to plead a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies has no application, the Congressional intent to preserve the doctrine of exhaustion of Intra-Union Remedies is defeated if such a member is not subject to discipline. Similarly the Congressional intent to protect his right to sue after exhausting Internal Intra-Union Remedies for four (4) months is defeated if a member who fails to exhaust his Internal Intra-Union Remedies within the four (4) months limitation is not subject to discipline.

In the instant case in the suit in the Superior Court and in the action in the District Court, no facts were pleaded to justify Burroughs' failure to exhaust his Internal Intra-Union Remedies or to state a cause

of action or claim under which the doctrine of exhaustion of Internal Intra-Union Remedies has no application.

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## **ARGUMENT**

### **INTRODUCTION**

The basic question presented by this appeal is whether in our industrial society, organized and regulated as it is, the Federal Courts are to be directly and immediately involved in the day to day operation of Labor Organizations or whether their role is to protect the individual member from oppression and the denial of his right to fair play at all times.

The development and formulation of the doctrine of exhaustion of Internal Intra-Union Remedies is based upon the principle that it is the duty of the Federal Courts to protect the individual from oppression and to see to it that the individual is treated fairly at all times. However, the doctrine is also based on the further proposition that it is not the obligation of the Federal Courts to be or become involved in the day to day operation of Labor Organizations.

If, as suggested by the District Court in its oral decision and in its findings of fact and conclusions of law in the instant case, every attempt to discipline a member must first be subject to the scrutiny of a Federal Court of the United States, at the election of a member, then of necessity, and a fortiori, the Federal Courts are involved day to day in the day to day operation of every Labor Organization.

Again, if there is no reasonably clear line to govern the activities of a Labor Organization other than the opinion of a particular judge at a particular time and place, so that the law is measured by the length of the Chancellor's foot, the orderly government and administration of Labor Organizations will not be possible.

Appellants submit that when Congress adopted 29 USC 411, et seq. it did so for the purpose of preserving and protecting the rights of the members of Labor Organizations and not for the purpose of involving the Courts in the day to day operation of Labor Unions or destroying the orderly government and administration of Labor Organizations.

As stated by Congressman Griffin, one of the authors of the legislation here being considered:

"The proviso which limits exhaustion of internal remedies is not intended to impose restrictions on a union member which do not otherwise exist, but rather to place a maximum on the length of time which may be required to exhaust such remedies. In other words, existing decisions which require, or do not require, exhaustion of such remedies are not to be affected except as a time limit of 4 months is superimposed. Also, by use of the phrase 'reasonable hearing procedures' in the proviso, it should be clear that no obligation is imposed to exhaust procedures where it would obviously be futile or would place an undue burden on the union member."

105 Daily Cong. Rec.  
App. A7915 (Sept. 4, 1959)

**ERROR NO. 1**

The District Court in its oral opinion said:

“The Court: You say, ‘It is further ordered, adjudged and decreed that defendant,’—and so on. This is a pretty broad order because let’s assume for a moment that there may be some justification for your past actions. Am I to conclude that having one court ruling you will be justified in saying that a repeated action of the same nature would be the same?

“We then end up with a sham that might very well be the basis for discipline. In other words, if the action ceased to be in good faith, isn’t your suggested order too broad?

“Mr. Stark: Yes, Your Honor, I think you are right” (R 257).

\* \* \* \* \*

“. . . All I am basically going to enjoin is a finding suspending for the moment the past court activity, not for any possible future. I will suggest that you prepare an order accordingly” (R 228).

The end result of the Court’s order is to restrain the International and Local from imposing any discipline for Burroughs’ past acts in violation of Article XVII, Section 4 of the International Constitution but leaving them free to impose discipline for any future act, i.e. since as the Court said:

“Am I to conclude that having one Court ruling you will be justified in saying that a repeat action of the same nature would be the same? We then end up with a sham that might very well be the basis for discipline” (R 257).

However, this is exactly what the International did in rendering its decision on Burroughs' appeal:

"... it was regularly moved and seconded that the decisions of Local Union No. 3 and the penalties imposed by it against the appellant be upheld and affirmed but that the enforcement of such penalties by Local Union No. 3 be stayed for a period of 3 years at which time the penalties shall be vacated, provided that the appellant does not within that period of time, directly or indirectly, take any action or support any action violative of Article XVIII (XVII), Section 4 of the Constitution of the International Union, and provided further that should the appellant take or support any such action within such period of time, the penalties imposed by Local Union No. 3 shall immediately and automatically become operative and enforceable by Local Union No. 3. This motion was put to a vote and was unanimously carried" (R 20-21).

"A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future."

43 CJS 445;

*Securities and Exchange Commission v. Torr,*  
87 F 2d 446.

It is not here alleged that the Local will fail to abide by the decision of the International or that the International would not enforce its decision and if such were the case then there would be a reason for the restraint.

**ERROR NO. 2**

The doctrine of "unclean hands" raises the question of good faith, i.e. the good faith of Burroughs in bringing the Stockton suit and the Sacramento action and is applicable in an action of this nature.

*Mitchell v. Demario Jewelry*, 361 US 288 (1960);

*I.B.E.W. v. Gulf Power Co.*, 182 F. Supp. 950 (N.D.Fla 1960);

*Schauffler v. Local 830*, 162 F. Supp. 1 (ED Pa. 1958);

See 2 US Code Cong. & Adm. News 2235, 2437 (1959).

Here we have a seriously disputed question of fact. As stated to the District Court:

"*First*: We are not here dealing with a Union member either uneducated, uninformed or ignorant of his Intra-Union rights.

"*Second*: We are dealing with a member who:

1. Was employed for many years as a Business Representative.
2. Was a member of the Local Union By-Laws Committee.
3. Was a candidate in every election held in the Local Union from 1960 through 1966, five (5) elections in all.

"*Third*: We are dealing with a knowledgeable, articulate member who has in the past used the appellate procedures provided by the International Constitution and Union By-Laws.

"*Fourth*: A Union member who used his right to appeal on other matters during the period of

time he was in the process of endeavoring to prepare a case against the Local Union.

*“Fifth:* A member who attempted to use Title I of the Labor-Management Reporting and Disclosure Act, 1959 to disrupt the daily operations of a Union that then represented approximately 32,000 members, operating from Guam through the State of Hawaii, Northern California, Northern Nevada and the State of Utah.

“This disruption of the Local Union was one of the very things Congress sought to avoid when it adopted Title IV:

“One final point is significant. Since union business must not be brought to a standstill whenever an election is challenged, it is necessary to make some provision for the conduct of business while the proceeding is in progress. It would be intolerable for the Government to appoint outsiders to act as receivers. The choice lay between keeping the old officers in office or allowing the new officers to enter upon their duties even though their right may be challenged. The latter course seems preferable. A union election could be presumed valid until the contrary can be reasonably established. There would be the least disruption of normal procedure within the unions if they were continued in office. However, the ultimate decisions upon this point should be made by the labor unions themselves. Consequently, section 302(a) provides that pending a final court decision the affairs of the union should be administered by the new officers or in such other manner as the constitution and by-laws might provide. An employer who dealt with

such officers would satisfy any duties under the National Labor Relations Act. The collective bargaining agreements they negotiated would be legally binding upon the union.'

'Legislative History of the Labor-Management Reporting and Disclosure Act of 1959—published by N.L.R.B., U.S. Govt. Printing Office, 1959, p. 417-p. 418'.

"Note not only the timing of the first lawsuit which could have been filed months before if the plaintiff was acting in good faith and with any consideration for the effects of his act on the economic well-being of his brother members.

"His first complaint was lodged with the Local Union in December, 1965. He filed his first lawsuit on August 23, 1966, eight (8) months later and just three (3) days before the Ballot Box, i.e. the Post Office Box was to be opened.

"The plaintiff in his appeal to the General President states:

"The cost of the election in Local 3 is generally reported to be in the area of \$25,000 to \$30,000 each.'

"Yet he deliberately and purposely, with full knowledge, let this cost be substantially increased by not filing his suit before August 10th, the first day for mailing ballots or in July before the preparations were made to mail ballots.

"Again the Restraining Order in the first suit was so drawn that if it had not been modified it would have voided the entire election.

"It was designed by plaintiff, with full knowledge of its effect, to prohibit the opening of the Post Office Box, i.e. Ballot Box. Thus, if it were

opened later, a valid claim that void ballots in an unknown number were mixed with valid ballots, could have been made.

“Fortunately, the Order of August 24, 1966, vacating the Order of August 23, 1966 prevented this plan of plaintiff from succeeding.

“Legislation passed to preserve and protect the democratic rights of members may not in good equity and good conscience be perverted to permit a dissident but articulate member to use such legislation to destroy the democratic expression of the majority of the members.

“No amount of legal legerdemain can justify the deliberate and calculated perversion of a statute to achieve the very thing the statute was passed to prevent” (R 114-R 117).

\* \* \* \* \*

“That plaintiff’s plan to render the election void by mixing valid with void ballots failed; that plaintiff’s plan of charging those in the office with the waste of a substantial sum by reason of such invalidity, failed is not important. What is important is that he devised and implemented the plan.

“His will to rule or ruin is clearly exemplified by his Second Action in the United States District Court filed on September 9, 1966 and returnable after he had been told by the Superior Court of this State that:

- (a) That he had failed to exhaust his Intra-Union remedy and the four month period had not expired September 13, 1966, and
- (b) That his claim for relief if legitimate must be processed under Title IV and not

Title I of the Labor-Management Reporting and Disclosure Act of 1959.

“But since Plaintiff was determined to rule or ruin, he chose to ignore the Superior Court’s finding, decision and order and proceeded with his attempted destruction of the Union’s democratic process, well knowing that September 15, 1966 was the last day under the By-Laws for the installation of Local Union Officers.

“As we have said, that he failed does not validate his conduct or clean his hands” (R 117-118).

Thus the finding read in the light of the Court’s oral opinion:

“... There is nothing here to show there wasn’t good faith on the part of the members” (R 229).

clearly shows that this disputed material issue of fact was determined by the Court adversely to the Appellants.

That the question of “good faith” in the opinion of the Court was a material fact is clear from the Court’s oral opinion (R 227-229) and the Court’s finding (R 221). Yet if there is an issue as to a material fact the motion must be denied.

Federal Practice and Procedures (Rules Edition) Vol. 3, pp. 121-122, Note 48 and cases cited.

The existence of this disputed question of fact was specifically called to the attention of counsel for Burroughs and the Court (R 233-234).

**ERROR NO. 3**

If as stated by the Court in its oral opinion:

“You might mention the Union provisions with relation to disciplining and if they constitute further disciplining because of court action, then such disciplining under the facts of this case would be illegal because this isn’t the equivalent of a sham court action. There is nothing here to show that there wasn’t good faith on the part of the members. You m(ay) submit your form to counsel and seek approval as to form” (R 228-229),

then the discipline would have been proper if the suit and action in the State and Federal Courts had not been brought by Burroughs in good faith.

However, since Burroughs was convicted after trial, the question of his good faith or lack of it was decided at that time and adversely to him. Since Burroughs does not attack either the proceedings as involving any denial of due process or his day in court or the fairness of the trial and his opportunity to be heard and call witnesses, the District Court and this Court are bound by that decision.

As stated succinctly in 51 CJS 824:

“While the courts will not overrule the decision of the Union’s tribunals merely because of a difference of opinion as to the merits or determine that as an original proposition that some other action would have been better they will review the action to ascertain whether such tribunals acted in accordance with the laws of the Union” (no such issue is here presented) “and the laws of the land” (here if the law is that he is

guilty under the Constitution if he acted other than in Good Faith as stated by the Court the question was determined by the Union tribunal, and it is not an issue here) “and whether the Union officials acted in good faith” (is not here involved for while the motives of individuals are challenged, there is no challenge as to the fairness of the proceedings themselves—hence this is not an issue here.)

This brings us to a consideration of the fact that the action in the United States District Court was commenced after Burroughs had had his day in court, in the Superior Court of the State of California, and had been told in no uncertain terms that his sole avenue of relief was under 29 USC 482 and not 29 USC 411(4) or 529 (R 77-78).

#### As stated by the Court

“The Court: . . . let’s assume for a moment that there may be some justification for your past actions. Am I to conclude that having one court ruling you will be justified in saying that a repeated action of the same nature would be the same?

“We then end up with a sham that might very well be the basis for discipline . . .” (R 227).

Yet that is exactly what Burroughs did. Having obtained a ruling from one court his repeated action of the same nature was a sham and we submit a proper subject for discipline.

Thus we respectfully submit that assuming arguendo the original action in the State Court was a

protected activity the repetition of the same act by commencing the same action in the United States District Court, after having been specifically told that his relief, if any, was under 29 USC 482, was not a protected activity. That the second proceeding was a sham and not brought in good faith and he was subject to discipline for such act.

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#### ERRORS NOS. 4 AND 5

Error No. 4 flows from error No. 5.

In its oral opinion the Court said:

“I would suggest that you take a look at Rhine (Ryan) vs. International Brotherhood of Electrical Workers, 361 Fed 2nd and use that as a basis for a finding and conclusion and order of the Court” (R 228).

That the internal procedures provided by the International Constitution are not too complicated or likely to result in long delays, and the remedy by appeal is no uncertain or futile remedy. This is clear from the Court’s decision in *Edsberg v. Local Union No. 12, International Union of Operating Engineers*, 300 F 2d 785-787 (1962) in which the same constitution was involved.

This Court in *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morley*, 378 F 2d 738-745 again stressed the fact that the doctrine of exhaustion of union remedies required an available remedy, neither uncertain nor futile.

In the instant case from December 12, 1966 to the date of the filing of his first suit, Burroughs had an available remedy, neither uncertain nor futile. He, however, elected to wait six (6) months before invoking the remedy.

We submit that properly understood the exhaustion of Intra-Union Remedies is an absolute requirement before asking the Federal Courts to intervene in intra-union activities.

As stated by this Court in *Edsberg*, supra:

“We need not decide whether exhaustion of remedies provided by the Union is an absolute requirement before asking the federal courts to intervene in intra-union activities” (R 106).

The difficulty with this problem stems from semantics.

The difficulties arise from the fact that for many years the Courts and lawyers have spoken and written of so-called “exceptions” to the doctrine.

Thus in *Destroy v. American Guild of Variety Artists*, 286 F 2d 75 we find the Court saying at page 79:

“If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to the courts has been almost entirely swallowed up by the exceptions phrased in broad terms.”

There are no “exceptions”. What we have is the impact of other and equally valid legal principles on the Doctrine of Exhaustion of Internal Remedies.

First—There must be a remedy. Obviously if there is no intra-union remedy the rule can have no application. This is no “exception”.

Second—The remedy must be neither uncertain nor futile—it must be one capable of being used. An unreasonable remedy is no remedy. This is no “exception”.

Third—The remedy must be one that meets the test of due process. This is no “exception”: procedures in the Courts can be subject to ancillary attack for this reason by various types of writs.

Fourth—The body or individual given the authority to decide the matter must be fair and impartial and may not prejudge the issue. This is no “exception”. Here the basic doctrine of a fair trial comes into play, and the Courts are subject to ancillary attack for the same reason.

In other words, the doctrine, the rule is subject to all of the limitations that all Courts and quasi-judicial bodies are subject to. But these are not “exceptions”.

Thus an action brought in the Federal Court because there is no remedy, or if there is a remedy because it is uncertain or futile is not an exception to the doctrine of exhaustion of Internal Intra-Union Remedies. The facts which call the rule and doctrine into being do not then exist. This is not an exception.

Again, if there is a lack of due process or a fair trial, we do not have an exception to the rule. We do have a question as to whether any “remedy” in fact exists and is available.

The word "remedy" imports one which pays due regard to due process and fair play, one in which the member has, to use a colloquialism, "a fair shake".

Now the plaintiff herein did not in the Superior Court in Stockton or in the Federal District Court in Sacramento allege that he brought the suit or action:

1. Because there was no remedy available,
2. Because there was a defect of due process,  
or
3. Because he would not get a fair hearing.

Had he so acted, we would not be here since the issue would have been not the application of the doctrine of exhaustion of remedy but whether the doctrine under the facts was applicable. These questions honestly and seriously urged, and they were not, would have placed before the Court the basic question —Did the member have an Intra-Union remedy?

Now, when we read 29 USC 411(a)(4) which provides as follows:

"No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislature: *Provided That any such member may be required to exhaust reasonable*

*hearing procedures (but not to exceed a fourth-month lapse of time within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.”* (Emphasis added)

It is clear that if “reasonable hearing procedures” exist, the prohibition against bringing an action in a Court for a period of four months is absolute.

If the question is whether or not “reasonable hearing procedures” exist, then the doctrine has no application unless it is determined that “reasonable hearing procedures” exist and of course resort to the Courts would be proper to determine that issue.

The issue, however, would not be the member’s grievance but whether “reasonable hearing procedures” were provided, and thus if they were and the Court so found, an attempt to further litigate the grievance would call the Constitutional provision prohibiting such suits into effect. If, however, the Court found that no “reasonable hearing procedures” existed, then there is no remedy to exhaust and the Constitutional provision is of no force or effect.

However, that was not the case here. There was no attack on the Constitutional provisions approved in *Edsberg v. Local Union No. 12, I.U.O.E.* (supra) some four years prior. There was no attack on the General President or the General Executive Board in

either the Stockton Superior Court action or that in the United States District Court in Sacramento. There was no question of due process or a fair trial.

In the suit brought in the Stockton Superior Court sitting in Stockton, the Court made and entered its order as follows:

“A secondary reason why this action is premature is that the petitioner has not exhausted his internal union remedies prior to the court action.

“Sections 411 and 482 of the 1959 Act provide that a member is not entitled to bring a court action unless he has first exhausted his hearing procedures and appeal remedies within the Union.

“It has been held that this requirement includes the appeal remedies within the International parent union as well as the Local (*Edsburg v. Local 12 of the Operating Engineers*, 300 F.2d 285 [Calif.Dist.Ct.]).

“The Local and/or the International are then given four months to redress the wrong before a court action is permissible.

“In the present case the petitioner exhausted his remedies within his Local but did not commence his appeal remedies within the International until late June of 1966. The International has not granted him any redress but the four month time limit in which it may act has not expired.”

While there is considerable diversity of opinion among the Circuits, they are in agreement with respect to Congressional Intent, namely that Congress desired to guarantee every member the right to test

union action in the courts and at the same time to preserve intact the doctrine of exhaustion of internal remedies with the limitation that no more than four months need be devoted to exhausting reasonable procedures.

See:

*Destroy v. American Guild of Variety Artists*,  
286 F 2d 75, cert. denied 366 US 929;  
*Harris v. International Longshoremen's Ass'n, Local 1291*, 321 F 2d 801.

While we have no quarrel with the decision reached in *Ryan v. International Brotherhood of Electrical Workers* (supra) we seriously question its reasoning since it sacrifices one Congressional purpose to sustain another.

This violates the basic concept of statutory interpretation which requires that a statute be interpreted so as to fully effectuate its purpose or purposes.

Incidentally the reasoning of this Court in *Fruit and Vegetable Packers and Warehousemen Local 760 v. Morely* (supra) properly applies to the *Ryan* case (supra) since there was no intra-union remedy whereby the member could obtain a binding determination as to the interpretation of the union contract with an employer.

As we view the case the result is correct for the reasons set out in *Morely* (supra).

In *Destroy v. American Guild of Variety Artists* (supra), again we have a complete absence of a

remedy that was neither uncertain nor futile—again we have a case squarely within the rule announced by this Court in *Morely* (supra).

In *Harris v. International Longshoremen's Ass'n Local 1291* (supra), we have a case in which the dispute was intra-union, where there was an intra-union remedy which was neither uncertain nor futile, i.e. a factual situation falling within the ambit of the doctrine of exhaustion of internal remedies, and the Court applied the doctrine.

Thus we submit that in those cases in which the doctrine of exhaustion of internal remedies applies, the requirement is absolute.

We, however, in order not to fall into the basic error in the *Ryan* case (supra) prefer to state the rule as follows:

In those cases in which a member sues and in good faith pleads a factual situation under which the doctrine of exhaustion of Internal Intra-Union Remedies does not apply, he is protected by the Statute whether he wins or loses.

That in all other cases he is required first to exhaust, for a period of not to exceed four (4) months, his Internal Intra-Union Remedies or be subject to discipline.

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#### CONCLUSION

Appellants respectfully submit that the District Court's order granting Summary Judgment should be

reversed and the Complaint dismissed for failing to state a claim on which relief may be granted.

Dated, San Francisco, California,  
July 25, 1968.

Respectfully submitted,  
**McCARTHY, JOHNSON & MILLER,**  
By P. H. McCARTHY, JR.,  
*Attorneys for Appellants.*

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#### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

P. H. McCARTHY, JR.,  
*Attorney for Appellants.*

No. 22,786

IN THE

United States Court of Appeals  
For the Ninth Circuit

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OPERATING ENGINEERS LOCAL UNION NO. 3,  
an unincorporated association, THE IN-  
TERNATIONAL UNION OF OPERATING ENGI-  
NEERS, an unincorporated association,  
HAROLD L. BOWEN, JAMES F. CHURCH,  
P. H. McCARTHY, Jr., et al.,

*Appellants,*

vs.

B. R. BURROUGHS,

*Appellee.*

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Appeal from the United States District Court  
for the Northern District of California,  
Southern Division

APPELLEE'S BRIEF

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## Subject Index

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	Page
Statement of the case .....	1
A. The undisputed facts .....	2
B. The issues .....	5
Summary of Argument .....	6
Argument .....	7
1. The discipline which was imposed upon the appellee is prohibited by the LMRDA .....	7
2. Appellee's good faith, or "clean hands," in instituting the actions which resulted in his discipline cannot now be questioned .....	15
a. Presenting the exhaustion issue in the state court and federal court actions .....	17
b. The reason for dismissal of the state court action .....	17
c. Appellee's grounds for believing that Local 3's election procedures were unlawful .....	18
3. The injunction was required to prevent further discipline .....	19
Conclusion .....	21

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## Table of Authorities Cited

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Cases	Pages
Allen v. International Alliance of Theatrical Stage Employees, etc., 338 F.2d 309 (5th Cir. 1964) .....	16
Burris v. International Brotherhood of Teamsters, 244 F. Supp. 277 (W.D.N.C. 1963) .....	12
Carroll v. Associated Musicians, etc., 235 F. Supp. 161 (S.D.N.Y. 1963) .....	14
Consumers Union of United States v. Admiral Corporation, 186 F. Supp. 800 (S.D.N.Y. 1960) .....	20
Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961), cert. denied, 366 U.S. 929 .....	12, 14
Farowitz v. Associated Musicians of Greater New York, 330 F.2d 999 (2d Cir. 1964) .....	18

## TABLE OF AUTHORITIES CITED

	Pages
Forline v. Helpers Local No. 42, 211 F. Supp. 315 (E.D.Pa. 1962) .....	17
Fruit and Vegetable Packers, etc. v. Morley, 378 F.2d 738 (9th Cir. 1967) .....	17
Industrial Union of Marine and Shipbuilding Workers, etc. v. NLRB, 379 F.2d 702 (3d Cir. 1967) .....	13
Local 138, International Union of Operating Engineers and Charles S. Skura, 148 NLRB 679 .....	13
Magelssen v. Local Union No. 518, etc., 233 F. Supp. 459 (W.D. Mo. 1964) .....	16
NLRB v. Industrial Union of Marine and Shipbuilding Workers, etc., U.S. ...., 20 L.Ed. 2d 706, 68 LRRM 2257 (1968) .....	8, 9, 10
Roberts v. N.L.R.B., 350 F.2d 427 (D.C. Cir. 1965) .....	12
Ryan v. International Brotherhood of Electrical Workers, 361 F.2d 942 (7th Cir. 1966), cert. denied, 385 U.S. 935 .....	10
Simmons v. Avisco Local 713, etc., 350 F.2d 1012 (4th Cir. 1965) .....	14
Wirtz v. Local 30, International Union of Operating Engineers, 242 F.Supp. 631 (S.D.N.Y. 1965) .....	19
Wirtz v. Local 191, etc., 218 F. Supp. 885 (D. Conn. 1963), affirmed, 330 F.2d 999 .....	9
Wirtz v. Local Unions No. 406, 406-A, 406-B and 406-C, International Union of Operating Engineers, 254 F. Supp. 962 (E.D. La. 1966) .....	18, 19

**Statutes**

Cal. Bus. and Prof. Code, Sec. foll. 6076, Rule 13 .....	15
29 U.S.C.A. 401-531 .....	3
29 U.S.C.A. 411(a)(1) .....	9
29 U.S.C.A. 411(a)(4) .....	5, 8, 10, 12
29 U.S.C.A. 411(a)(5) .....	15
29 U.S.C.A. 412, 413 .....	8
29 U.S.C.A. 481-482 .....	9
29 U.S.C.A. 529 .....	8

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IN THE

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OPERATING ENGINEERS LOCAL UNION NO. 3,  
an unincorporated association, THE IN-  
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HAROLD L. BOWEN, JAMES F. CHURCH,  
P. H. McCARTHY, JR., et al.,

*Appellants,*

vs.

B. R. BURROUGHS,

*Appellee.*

**Appeal from the United States District Court  
for the Northern District of California,  
Southern Division**

**APPELLEE'S BRIEF**

**STATEMENT OF THE CASE**

This is an appeal from a partial summary judgment which permanently enjoins appellant labor organizations from disciplining appellee for commencing two specified lawsuits without having first exhausted four months' internal union remedies. (R. 222:22-224:26.)<sup>1</sup>

<sup>1</sup>The Transcript of Record on Appeal will be referred to as "R". Numerical references preceding a colon are to the record page; numerical references following the colon are to lines on the indicated page. Appellants' Opening Brief is abbreviated herein as "A.O.B." Italics supplied throughout, except as otherwise indicated.

#### A. The Undisputed Facts

Appellee (sometimes referred to herein as "Mr. Burroughs") is now and for the past twenty-five years has been an active member of appellant Operating Engineers Local Union No. 3 (hereafter "Local 3"). (R. 218:23-25.)

Being opposed to certain election procedures followed by Local 3 and realizing that an election which would be governed by those procedures was scheduled for August 1966, Mr. Burroughs began in December 1965 to communicate his specific grounds of complaint to the officers of Local 3, sending copies of his letters to Local 3's parent, appellant International Union of Operating Engineers (hereafter sometimes referred to as "International"). (R. 189:7-13; R. 121-168.)

These communications made specific reference to the legal authority upon which appellee based his complaints, including citations to several decided cases involving other local unions of the International Union of Operating Engineers which held that the precise election procedures of which he was complaining were in conflict with federal statutes. (e.g., R. 136.)

In most instances, Mr. Burroughs' letters either went unanswered or were answered inconclusively. (R. 189:14-21, e.g., R. 134, 140, 141.)

Shortly before the scheduled election, and only when it became clear that the election procedures of Local 3 would not voluntarily be changed, appellee commenced a lawsuit, under Title I of the Labor Management Reporting and Disclosure Act of 1959,

73 Stat. 519-541 29 U.S.C.A. 401-531 (hereinafter the ("LMRDA")) against his union in the Superior Court of the State of California for San Joaquin County (hereafter referred to as "the state court action"). This action was filed through and upon the advice of his attorney, and it sought to enjoin the holding of an election which Mr. Burroughs and his attorney were convinced was being conducted pursuant to procedures which had been held to be so illegal as to require the holding of a second election. (R. 189:22-190:7.)

The state court, however, decided that appellee's complaints were within the exclusive jurisdiction of the federal courts, and it accordingly refused to issue its injunction. (R. 72:7-73:19.) Rather than appeal the state court's refusal to act, largely because time was clearly of the essence, Mr. Burroughs' attorney advised him to file, and Mr. Burroughs did file (through his attorney), an action in the United States District Court in Sacramento (hereafter referred to as "the federal court action"). This action was not pressed, as the election which was sought to be enjoined was completed while it was pending. (R. 190:11-15, 30-32; R. 191:6-7.)

Both of the aforesaid actions were filed through and upon the advice of his attorney, and each based claim for relief upon Title I of the LMRDA. (R. 56:24-28; R. 87:29-32.) Contrary to the assertion in appellants' opening brief (A.O.B. 4), each action contained the allegation that Mr. Burroughs had exhausted required internal union remedies. (R. 57:28-30; 90:5-7.)

As a result of appellee's institution of the aforementioned lawsuits, two charges were made against and served upon him, one by appellant Bowen, a member of Local 3, in regard to his commencement of the state court action and the other by appellant Church, also a member of Local 3, in regard to his commencement of the federal court action. Both charges were identical, except for the identification of the lawsuit, and each specifically charged that:

"... [appellee] commenced a civil action against Operating Engineers Local Union No. 3 in which he sought [certain specified relief] without in the four (4) months next preceding commencement of the civil action or at any time having exhausted all or any rights, remedies and reasonable provisions for hearing and appeal within the organization." (R. 10-13.)

Mr. Burroughs was found guilty of these charges at two separate union trials, one in Stockton relating to the state court action, and the second in Sacramento relating to the federal court action and, pursuant to Article XVII, Section 4 of the International Constitution,<sup>2</sup> he was fined a total amount of \$7,158.33. (R. 3:23-31; R. 191:10-19.)

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<sup>2</sup>Article XVII, Section 4 of the International Constitution provides:

"All Court Actions Superseded

Art. XVII Section 4. No suit or other action at law or equity shall be brought in any court and no proceeding shall be initiated before any administrative agency by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and reasonable provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. This pro-

Mr. Burroughs appealed this discipline to the International, which upheld and affirmed the decisions and penalties imposed by Local 3, but stayed the enforcement thereof on the condition that for three years Mr. Burroughs not directly or indirectly support or participate in any legal action violative of Article XVII, Section 4. (R. 20-21.)

Appellee then instituted this action, challenging the legality of the discipline imposed upon him. He sought and obtained summary judgment that the discipline was, as he contended, in violation of rights guaranteed him by the LMRDA.

#### **B. The Issues**

Appellants' arguments for reversing such judgment can be distilled to three main contentions, namely: (1) LMRDA Section 101(a)(4) should be interpreted to permit a union to discipline one of its members for suing it without first exhausting "reasonable" intra-union remedies for a period of four months; (2) The issue of appellee's good faith in filing the lawsuits which resulted in his discipline is one of material fact not to be decided on summary judgment; and (3) The relief granted by the district court was unnecessary, as it was the same as that granted by International.

---

vision shall only require resort to internal remedies for a period not exceeding four (4) months. Any member violating this provision, shall, in addition to the penalties prescribed in the Constitution and Ritual, be subject to a fine equal to the full amount of the costs incurred in the defense of any such action by the Union, together with such costs additional as the court may fix or assess against said member."

The district court, in its conclusions of law herein, held said provision to be in violation of the LMRDA as applied to the facts of this case. (R. 221:18-20)

Specifically, the issues which this court is asked to decide are:

1. Whether a labor organization may discipline one of its members solely because it decides that he filed a lawsuit against it without first exhausting internal union remedies for a period of four months?
  2. Whether, in view of the charges which formed the basis of appellee's discipline, his good faith is an issue in this litigation?
  3. Whether the decision of the International Union conditionally suspending the enforcement of appellee's discipline rendered the permanent injunction of the district court unnecessary?
- 

#### **SUMMARY OF ARGUMENT**

1. The LMRDA specifically precludes a union from punishing one of its members for commencing a lawsuit against it. The provision of that Act relating to internal union remedies has been consistently interpreted to mean that only a court, in its discretion, may require exhaustion of internal union remedies before granting judicial relief.
2. Only those grounds contained in the specific charges upon which a union member's discipline is based may be urged as justification for his discipline. Since appellee's good faith in instituting the lawsuits which resulted in his punishment was not an issue which was presented by the charges which form the

basis for his discipline, it is not a material issue in this litigation.

3. The permanent injunction issued by the district court is not rendered unnecessary by the International's conditional suspension of enforcement of the enjoined discipline.

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## ARGUMENT

### **1. THE DISCIPLINE WHICH WAS IMPOSED UPON THE APPELLEE IS PROHIBITED BY THE LMRDA.**

Since appellee claims that discipline imposed upon him based solely on the charge that "he commenced a civil action against [Local 3] . . . without in the four months next preceding commencement of the civil action . . . having exhausted all or any rights, remedies and reasonable provisions for hearing and appeal within the organization," is illegal, even if such charge is true, the only issue material to appellee's claim for injunctive relief is whether he was disciplined by his union on such ground. Neither he nor appellants question the fact that he was so disciplined.

While it is true that the parties are in dispute as to whether appellee exhausted available intra-union remedies prior to institution of the lawsuit for which he was disciplined, the cases cited below make it clear that this fact is immaterial, and that as a matter of law, discipline of a union member by his union solely because he filed suit against it before exhausting

four months' intra-union remedies is a violation of the LMRDA.

Appellants admit that the discipline complained of was imposed because appellee commenced a lawsuit to enforce "his rights under Title I of the U.S. Labor Management Disclosure Act of 1959". (R. 29:17-19.) It is clear that the right to institute such a lawsuit is specifically guaranteed by the LMRDA. LMRDA §§102, 103 (29 U.S.C.A. §§412, 413).

Additionally, the Act specifically prohibits a union from disciplining a member for exercising a right guaranteed by the Act. Section 609 of the Act (29 U.S.C.A. §529) provides:

"It shall be unlawful for any labor organization, or any officer, agency, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. \* \* \*"

While it is true that a union member is subject to the requirement that he exhaust available internal union remedies for a period of four months prior to instituting suit against his union (LMRDA §101 (a) (4), 29 U.S.C.A. 411 (a) (4)), it has been consistently held that this exhaustion requirement is one of judicial administration and is to be implemented only through the court's exercise of discretion as to whether it will permit suit.

*NLRB v. Industrial Union of Marine and Shipbuilding Workers, etc., ..... U.S. ...., 20 L.Ed.2d*

706, 68 LRRM 2257 (1968), is directly in point. In that case the Supreme Court held that a labor union may not discipline one of its members because he took legal action against it without first exhausting intra-union remedies.<sup>3</sup> In that case as in this, a union member was disciplined by his union on the ground that he took legal action against his union without first exhausting four months available internal union remedies. In that case as in this, the union imposed the discipline pursuant to constitutional provision. In that case as in this, the union found as a fact that the legal action was taken without exhausting internal union remedies. In that case as in this, the issue to be decided by the court was whether such discipline was lawful.

As appellants argue in the present case, the Marine & Shipbuilders Union argued that union discipline was proper so long as the intra-union remedies would impose no unreasonable delay or hardship upon the complainant. This argument was rejected, the Supreme Court stating:

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<sup>3</sup>The Supreme Court limited its holding to situations where, as in the present case, "the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act" (20 L.Ed2d, at 714). In the present case, Mr. Burroughs' complaints specifically alleged that Local No. 3's election procedures were in violation of the LMRDA, which extensively covers union elections. There is no question but that union elections are considered by Congress to be a part of the public domain. See LMRDA §§101(a)(1), 401-402, 29 U.S.C.A. §§411(a)(1), 481-482; See also *Wirtz v. Local 191, etc.*, 218 F.Supp. 855 (D.Conn. 1963), *aff'd*. 330 F.2d 999 ("Congress recognized that . . . the public interest in safeguarding and improving the [union] electoral process exceeds even that of the members . . .").

The difficulty is that a member would have to guess what a court ultimately would hold. If he guessed wrong and filed the charge . . . without exhausting internal union procedures, he would have no recourse against the discipline of the union. That risk alone is likely to chill the exercise of a member's right to a . . . remedy and induce him to forego his grievance or pursue a futile union procedure. (20 L.Ed.2d at 713)

Also as in the present case, the union argued that the proviso to LMRDA §101(a)(4) authorized such discipline. The Supreme Court also rejected this argument, concluding:

We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency. (*Ibid.*)

The *Marine and Shipbuilding Workers* case, while the most recent and authoritative directive, is not the only precedent for affirming the judgment in this case. In *Ryan v. International Brotherhood of Electrical Workers*, 361 F.2d 942 (7th Cir. 1966), *cert. denied*, 385 U.S. 935, both the District Court and the Court of Appeals for the Seventh Circuit decided that a union member who was disciplined by his

union because he sued it without first exhausting four months available internal union remedies was entitled to summary judgment that the discipline was unlawful. The Court of Appeals explained its decision as follows:

"The Union admits that courts may, when the rule of exhaustion of remedies is posed as a defense to a member's suit, exercise discretion whether to require that internal union remedies be exhausted. The Union claims, however, that it has the right to discipline a member . . . should a member bring a suit without having first exhausted reasonable union procedures for review. In other words, that the Union may expel a member for bringing suit if the Court's discretion is exercised in favor of the defense of exhaustion of remedies and the suit dismissed as premature.

\* \* \*

"This claim of the Union, it seems to us, makes a member's bringing of a suit against a union or its officers too chancy a gamble for the member and effectively blocks access to the courts by placing the member in the dilemma of swallowing the grievance about which he wishes to sue (and against which the court might grant immediate and necessary relief), or suing upon the speculation that he will be safe from expulsion by the court's discretion being exercised in his favor.

"Congress cannot have intended to burden the protection it gave union members, in their right to sue in the 'Bill of Rights' of the LMRDA, with the hazard that is clear in defendants' claim. The right of free access to our courts is too precious a right to be curbed by the risky predic-

tion that the judge's discretion may, like a lucky roll of the dice, turn up in favor of the suitor."

See also *Destroy v. American Guild of Variety Artists*, 286 F.2d 75, 78 (2d Cir. 1961) ("We . . . construe the statute [101 (a) (4)] to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required by that court or agency to exhaust internal remedies of less than four months duration before invoking outside assistance." [Emphasis by the court]), and *Burris v. International Brotherhood of Teamsters*, 244 Fed.Supp. 277, 280 (W.D.N.C. 1963) ("It is for the court to determine, in the exercise of some discretion, whether or not the proviso [of 101 (a) (4)] is to be invoked" [Emphasis by the court]).

Neither is this the first case where a local of the International Union of Operating Engineers has attempted to justify discipline of one of its members for taking legal action against it without first exhausting internal remedies.

In *Roberts v. NLRB*, 350 F.2d 427, 430 (D.C. Cir. 1965), involving Operating Engineers Local 925, the court held that discipline of a member by his union for filing charges with the NLRB without first exhausting internal union remedies was an unfair labor practice, to wit, restraint and coercion of employees in the exercise of their rights under the National Labor Relations Act. The court also considered the exhaustion proviso of LMRDA Section 101 (a) (4), and concluded:

"The proviso does authorize indeed it may require, the agency or court to which the member comes for relief to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted—in deference to the congressional desire that a solution be reached by means other than at the hands of public authorities. Approval of such restraint by agency or court is quite different, however, from freeing the Union itself to impose a fine for failure of a member to exhaust such procedures. As then Professor Cox put it, 'the rule is one of judicial administration.' Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 831 (1960). And see the remarks of then Senator Kennedy, 105 Cong. Rec. 16414 (daily ed. September 3, 1959), 2 Leg. Hist. LMRDA 1943."

See also, *Local 138, International Union of Operating Engineers and Charles S. Skura*, 148 N.L.R.B. 679.<sup>4</sup>

Appellants have obviously spent considerable time and effort in presenting to the Court their view as to the status of the exhaustion of remedies doctrine in the federal courts, and they set forth facts which they conclude establish that appellee did not, in either the state court action or the federal court action, bring himself within any of the recognized exceptions to the exhaustion requirement. (A.O.B. 25-30.)

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<sup>4</sup>The rule of the *Roberts* and *Skura* cases was rejected by the Court of Appeals in *Industrial Union of Marine and Shipbuilding Workers, etc. v. NLRB*, 379 F.2d 702 (3d Cir. 1967). As noted above, the Supreme Court reversed. *NLRB v. Industrial Union of Marine and Shipbuilding Workers, supra.*

This appeal, however, does not concern the question of whether Mr. Burroughs did or did not in fact exhaust all available intra-union remedies prior to filing the actions which resulted in his discipline. What this appeal is concerned with is the asserted right of his union to discipline him if he is found to have instituted such actions without having first exhausted such intra-union remedies.

Appellee agrees, arguendo, with appellants' conclusion that there is a requirement that a union member exhaust "reasonable" intra-union remedies prior to bringing suit against his union.<sup>5</sup> It is evident, however, that such a conclusion does not tell us what consequences flow from failure to meet such requirement. It is appellee's position that he has a right to have a court decide whether, under the specific facts of his case, further exhaustion of intra-union remedies would be required. It is his position that his union may not restrict this right by severely punishing him if a court happens to decide that further exhaustion is required.

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<sup>5</sup>The language of Section 101 (a) (4) itself, providing that a union member "may be required to exhaust" intra-union remedies for not to exceed four months, and many cases, indicate that the exhaustion "requirement" is not one which is absolute. See for example, *Simmons v. Avisco, Local 713, etc.*, 350 F.2d 1012 (4th Cir. 1965); *Destroy v. American Guild of Variety Artists*, 286 F.2d 75 (2d Cir. 1961), cert. den., 366 U.S. 929; *Carroll v. Associated Musicians, etc.*, 235 F.Supp. 161, 171 (S.D.N.Y. 1963).

**2. APPELLEE'S GOOD FAITH, OR "CLEAN HANDS," IN INSTITUTING THE ACTIONS WHICH RESULTED IN HIS DISCIPLINE CANNOT NOW BE QUESTIONED.**

Appellants ask this Court to limit the application of the foregoing authorities and principles to situations where the lawsuit by the disciplined member was one filed in good faith, or, put another way, that lack of good faith results in "unclean hands" which may prevent judicial relief.

Whether or not the foregoing authorities should be so limited is immaterial to the present case, as the issue of such lack of good faith was not presented in the charges and trial which form the basis of the union member's discipline.<sup>6</sup> In a case such as the present one, where no issue of good faith was in any manner presented by the charges served upon the appellee, and when the sole question decided at the union trial was whether or not the required internal union remedies were properly exhausted, appellee's lack of good faith cannot be used as a justification for his discipline.

Section 101 (a) (5) of the LMRDA (29 U.S.C.A. 411 (a) (5)) provides that:

"No member of any labor organization may be . . . disciplined . . . by such labor organization unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

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<sup>6</sup>Appellee vigorously denies, however, that the actions which his attorney filed on his behalf were filed in bad faith—a serious violation by his attorney of the Rules of Professional Conduct. See Cal. Bus. and Prof. Code, Sec. foll.6076, Rule 13.

In *Allen v. International Alliance of Theatrical Stage Employees, etc.*, 338 F.2d 309 (5th Cir. 1964), it was specifically held that no discipline may be justified on grounds not contained in the "written specific charges" required by the Act, and that any discipline based on other grounds not specified in such charges must be vacated notwithstanding justification on such other grounds. See also *Magelssen v. Local Union No. 518, etc.*, 233 F.Supp. 459 (W.D. Mo. 1964).

In the present case, appellee's union found, as a fact, that the charge that "he commenced a civil action against Operating Engineers Local Union No. 3 . . . without in the four months next preceding commencement of the civil action or at any time having exhausted any rights, remedies and reasonable provisions for hearing and appeal within the organization," was true.

No other facts were found by or presented at the Local 3 trial, and it was this charge and this charge alone which formed the basis for Mr. Burroughs' discipline. (R. 191:10-19.)

No issue as to any of the grounds now urged by appellants to justify appellee's discipline was presented at his union trial. Irrespective of whether it would be proper for a union to discipline one of its members on the grounds now urged by appellants, the failure to specify such grounds in the "written specific charges" served upon plaintiff precluded the district court, as it does this court, from considering them.

Since appellants have presented such matters, however, appellee feels that they deserve a response.

a. **Presenting the Exhaustion Issue in the State Court and Federal Court Actions.**

It is urged by appellants that Mr. Burroughs did not attempt to present to the court, in either the state court or the federal court action, a situation where intra-union remedies could be ignored.

Although the present record indicates that appellee did in fact raise the exhaustion issue in both the state and federal actions (R. 57:28-30; R. 90:5-7), even had he not raised the issue, this would not even have been reason to dismiss his action, let alone authorize union discipline. It has been held that failure to exhaust is a defense, and facts showing failure to exhaust without excuse must be presented by the *Union. Fruit and Vegetable Packers, etc. v. Morley*, 378 F. 2d 738 (9th Cir. 1967).<sup>7</sup> See also *Forline v. Helpers Local No. 42*, 211 F.Supp. 315, 317-18 (E.D. Pa. 1962).

b. **The Reason for Dismissal of the State Court Action.**

Appellants point out that the judge in the state court action found that Mr. Burroughs filed his action before giving the International Union four months within which to act on his appeal, and notwithstanding-

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<sup>7</sup>"[W]e recognize that the exhaustion of intra-union remedies doctrine cannot apply unless there is available from the union a remedy which is neither uncertain nor futile. Inherent in this proposition is the idea that to invoke the exhaustion principle, *the union must show* that there was a procedure available to the members calculated to redress the particular grievance complained of."

ing such judgment, plaintiff filed a second action, referred to by appellants as a "sham", in the United States District Court in Sacramento.

As the full memorandum opinion in the state court action reflects, that action was dismissed on the ground that the action should have been brought in federal court, as the state court had no jurisdiction of the subject matter of the action. (R. 72:7-73:19.) Instead of appealing the ruling of the state court, appellee, upon the advice of his attorney, went to the federal court in Sacramento, where proceedings were suspended when the election was completed. (R. 190: 11-15, 30-32; R. 191:6-7.)

**c. Appellee's Grounds for Believing That Local 3's Election Procedures Were Unlawful.**

As stated in *Farowitz v. Associated Musicians of Greater New York*, 330 F.2d 999, 1002 (2d Cir. 1964):

"A member's responsibility to his union as an institution surely cannot include any obligation that he sit idly by while the union follows a course of conduct which he reasonably believes to be illegal because of what a court of law has stated."

In the present situation, appellee's objection to the election which he sued to enjoin was based not upon his or his attorneys' unsupported beliefs, but upon specific judicial holdings in cases declaring nominating and voting procedures identical with those of Local 3 unlawful and grounds for setting aside an election. See *Wirtz v. Local Unions No. 406, 406-A, 406-B and 406-C, International Union of Operating*

*Engineers*, 254 F.Supp. 962 (E.D. La. 1966), holding the five year continuing membership requirement contained in Article XII, Section (A) 1 (a) of Local 3 By-laws and the declaration of candidacy provisions contained in Article XII, Section (B) 1 (a) of Local 3 By-laws grounds for setting aside an election; and *Wirtz v. Local 30, International Union of Operating Engineers*, 242 F.Supp. 631 (S.D.N.Y. 1965), similarly condemning the declaration of candidacy provision.

To say in the face of such precedents that the law-suits filed by appellee were in bad faith, with unclean hands and were "sham", is clearly an unjustified attack on both appellee and his attorneys.

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### **3. THE INJUNCTION WAS REQUIRED TO PREVENT FURTHER DISCIPLINE.**

Appellants argue that the order of the district court which, they admit, "restrain [s] the International and Local from imposing any Discipline for Burroughs' past acts in violation of Article XVII, Section 4 of the International Constitution" (A.O.B. 15) grants relief no greater than that which had already been granted by the International when it upheld and affirmed the decision of Local 3, but stayed its enforcement upon the condition that, for three years, appellee not take or support, directly or indirectly, any legal action against his union without first exhausting intra-union remedies. (R. 20-21.)

Absent the injunction of the district court, appellee is subject to the “*immediate and automatic enforcement*” (R. 21) of that very fine of which he here complains if he files or even “supports directly or indirectly” (R. 21) a lawsuit against his union in the future and it is decided that there was a failure to exhaust four months’ intra-union remedies.

To say that such an immediate and automatic fine would not be discipline for the institution of the two lawsuits which have heretofore been filed is the epitome of form over substance. If appellants truly believe that such is the case, and that the district court granted relief no different than that granted by the district court, their appeal from the relief granted by the district court is a curious act indeed.<sup>8</sup>

Furthermore, the Article and Section of the International Constitution upon which the “stay” of the enforcement of the fines is conditioned, is the precise provision which was held by the district court to be in conflict with the LMRDA. Appellee claims, and the court below has decided, that this provision is in conflict with rights guaranteed appellee by the LMRDA. For the International to stay appellee’s discipline so long as he does not exercise his legal rights is itself discipline of the most coercive type. It is this discipline, as well as the fines, which the district court’s order enjoins. Clearly, its injunction was not superfluous.

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<sup>8</sup>See *Consumers Union of United States v. Admiral Corporation*, 186 F.Supp. 800, 801 (S.D.N.Y. 1960): “If defendant has no intention of repeating [the acts enjoined], then no injury ensues to it from the granting of the injunction.”

**CONCLUSION**

Reversal of the judgment of the district court would effectively curtail the precious right of free access to the courts guaranteed every union member by the LMRDA. It is respectfully submitted that the decision of the district court should be affirmed.

Dated, Sacramento, California,  
September 3, 1968.

Respectfully submitted,  
STARK, SIMON & SPARROWE,  
By MERRILL J. SCHWARTZ,  
*Attorneys for Appellee.*



No. 22,786

IN THE

United States Court of Appeals  
For the Ninth Circuit

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OPERATING ENGINEERS LOCAL UNION No. 3,  
an unincorporated association, THE IN-  
TERNATIONAL UNION OF OPERATING EN-  
GINEERS, an unincorporated association,  
HAROLD L. BOWEN, JAMES F. CHURCH,  
P. H. McCARTHY, JR., et al.,

*Appellants,*

vs.

B. R. BURROUGHS,

*Appellee.*

Appeal from the United States District Court for the  
Northern District of California,  
Southern Division

APPELLANTS' CLOSING BRIEF

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## **Subject Index**

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	Page
Issues .....	1
Summary of Argument .....	3
Conclusion .....	7

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## **Table of Authorities Cited**

---

<b>Cases</b>	<b>Pages</b>
Edsberg v. Local Union No. 12 I.U.O.E., 30 F 2d 785 (1962) .....	6

Local 138 International Union of Operating Engineers and Charles S. Skura, 148 NLRB 679 .....	3
---	---

NLRB v. Industrial Union of Marine and Shipbuilding Workers etc., ..... US ....., 20 L ed 2d 706 (1968) ....	3, 4
--	------

### **Codes**

29 USC 411(a)(4) .....	3
------------------------	---

### **Statutes**

NLRA:

Union shop provision in Section 8(a)(3) .....	4
---	---



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**ISSUES**

Without agreeing with Appellees' statement of the issues but in an effort to state Appellants' position, attention is directed to Appellee's statement, page 6, Appellee's Brief.

Appellee would state the first issue as follows.

"1. Whether a labor organization may discipline one of its members solely because it decides

that he filed a lawsuit against it without first exhausting internal union remedies for a period of four months?"

Appellants using the same approach would state it as follows:

"Whether a Labor Organization may, the doctrine of exhaustion of internal Union remedies being applicable, discipline one of its members because the member elects to seek an injunction in the Civil Courts without exhausting his internal, intra-Union remedies for a period of not more than four (4) months?"

Appellee would state the second issue as follows:

"2. Whether, in view of the charges which formed the basis of appellee's discipline, his good faith is an issue in this litigation?"

Appellant would state it as follows:

"Whether in view of the fact that the Appellee defended at his intra-Union trial upon the ground of good faith, his good faith is an issue?"

Appellee states his third issue as follows:

"3. Whether the decision of the International Union conditionally suspending the enforcement of appellee's discipline rendered the permanent injunction of the district court unnecessary?"

Appellant in the light of the oral opinion of the Trial Court which puts a "gloss" on its order would state it as follows:

"Whether the decision of the International Union suspending the enforcement of the Local Union's fines, conditioned on the continued good

faith of Appellee for three years, without any claim that the Local Union would not or had not abided this decision, rendered the permanent injunction unnecessary.”

We prefer, however, to rest on the issues as stated in Appellants' Brief under the title “Specification of Errors”.

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#### SUMMARY OF ARGUMENT

We end where we started.

Did Congress intend to change existing substantive law? The answer we submit is no.

Did Congress intend to change existing adjective law and to place a limitation on the time during which a member must exhaust available internal intra-Union remedies? The answer is yes.

Both *NLRB v. Industrial Union of Marine and Shipbuilding Workers etc.*.....US.....20 L ed 2d 706 (1968) and *Local 138 International Union of Operating Engineers and Charles S. Skura*, 148 NLRB 679, support the answers given above and the Argument in Appellants' Brief.

29 USC 411 (a)(4) provides:

“No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, . . . . .”

However, in the cases relied upon by Appellee, the member did not institute an action in any court, nor did he institute a proceeding before any Administrative Body.

The member in those cases invoked a disciplinary arm of the Executive Branch of the Federal Government to vindicate an Employee right (not a Membership right) guaranteed by the National Labor Relations Act.

In those cases an Employee in his capacity as an Employee complained to the General Counsel of the National Labor Relations Board charging that a right given him as an Employee by the National Labor Relations Act has been violated. After investigation the General Counsel believing that a violation of the Employee's Statutory Right had occurred, the General Counsel, not the Employee, issued a complaint and proceeded against the Union the General Counsel believing the Union had violated the Employee's Statutory Right.

The rights there involved were not Member's rights. They were Employee's rights, since except for the Union Shop Provision in Section 8(a)(3) of that Act, Union membership or lack of it are of no moment and it was not involved.

Thus we find the Supreme Court in *NLRB v. Industrial Union of Marine and Shipbuilding Workers, etc.....US.....(supra)*, says:

"We held in *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 65 LRRM 2449, that § 8(b)(1)(A) does not pre-

vent a union from imposing fines on members who cross a picket line created to implement an authorized strike. The strike, we said, ‘is the ultimate weapon in labor’s arsenal for achieving agreement upon its terms’ and the power to fine or expel a strikebreaker ‘is essential if the union is to be an effective bargaining agent.’” Id. at 181.

“Thus § 8(b)(1)(A) assures a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play.

(p. 712.)

\* \* \* \* \*

“.... A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the Skura case. Local 138, International Union of Operating Engineers, 148 NLRB 679, 57 LRRM 1009; and we agree that the overriding public interests makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved.”

(p. 714.)

\* \* \* \* \*

“We conclude that unions were authorized to have hearing procedures for processing grievances of members, provided those procedures did

not consume more than four months of time; but that a court or agency might consider whether a particular procedure was 'reasonable' and entertain the complaint even though those procedures had not been 'exhausted.' We also conclude, for reasons stated earlier in this opinion, that where the complaint or grievance does not concern an internal union matter, but touches a part of the public domain covered by the Act, failure to resort to any intra-union grievance procedure is not grounds for expulsion from a union. We hold that the Board properly entertained the complaint of Holder and that its order should be enforced."

(p. 714.)

Here the "reasonableness of the procedures", Internal Intra-Union Remedy, was not attacked by Appellee in either lawsuit. In fact the "reasonableness of the procedures" was approved in *Edsberg v. Local Union No. 12 I.U.O.E.*, 30 F 2d 785 (1962.)

Obviously the doctrine of exhaustion of internal Intra-Union remedies has no application to the Federal Government when the Federal Government through its duly constituted officers proceeds against the person complained of by another.

Had the Appellee taken his complaint to the Secretary of Labor as advised by the Superior Court so to do, there would be no question of his right so to do.

To hold that the doctrine of exhaustion of internal intra-Union remedies has no application to a proceeding instituted in the name of the United States or one of its administrative arms by one of the prose-

cuting officers of the Federal Government is not to hold that the statute here involved wiped out the doctrine of exhaustion of internal Union remedies.

Certainly the Secretary of Labor or the General Counsel of the National Labor Relations Board have no internal, intra-Union remedies to exhaust.

With respect to Appellee's issue of Good Faith—since no question was raised as to the conduct of the trial, neither a transcript of the trial nor the affidavit of Appellee read at the trial is before this Court; however, the affidavit of T. J. Stapleton, undenied, which is before the Court sets out the facts which completely negative the claim of "good faith". (R 169-178.)

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### **CONCLUSION**

We are not here dealing with a question of expulsion or loss of job rights or job opportunities of an employee who is a member of a Labor Union. We are here concerned with the question of whether or not a Union of 32,000 members with substantial contractual and other obligations operating in five states may lawfully insist that no member has the right to disrupt its operations and bring them to a standstill without first exhausting internal intra-Union remedies and reasonable hearing procedures for a period of at least four months before appealing to the Civil Courts.

For as stated by the Congressional Committee:

"One final point is significant. Since union business must not be brought to a standstill when-

ever an election is challenged, it is necessary to make some provision for the conduct of business while the proceeding is in progress."

Legislative History of the Labor-Management Reporting and Disclosure Act of 1959—published by N.L.R.B., U.S. Govt. Printing Office, 1959, p. 417.

This Congress did in Title IV of that Act.

Appellee, however, did not concur in the position and action of the Congress but sought to create the very problems Congress sought to avoid. He sought to bring the business of the Union to a standstill by challenging an election.

Under the doctrine of exhaustion of Union remedies as developed by the Courts, both the Union and its members know where they stand, and so far as there may be certitude in law, it here exists.

For this Appellee would substitute the mental state of a member bringing a civil action, and as a result the essential Congressional purpose, responsible Unions to deal responsibly with their members and management would be destroyed.

It is clear that it was not the intent of Congress in the field of Labor-Management Relations to substitute uncertainty for certainty or to take from Unions the authority to require their members to be equally responsible and to act within the framework of reasonable regulations, reasonably enforced.

Appellants respectfully submit that the District Court's order granting Summary Judgment should be

reversed and the Complaint dismissed for failing to state a claim on which relief may be granted.

Dated, San Francisco, California,  
October 10, 1968.

Respectfully submitted,  
McCarthy, Johnson & Miller,  
By P. H. McCarthy, Jr.,  
*Attorneys for Appellants.*









